

KFN

5146

M11

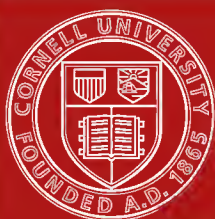
1876

CORNELL LAW LIBRARY

CORNELL UNIVERSITY LIBRARY



3 1924 050 134 323



Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

THE
RIGHTS, REMEDIES AND LIABILITIES
OF
LANDLORD AND TENANT,
INCLUDING
THE LAW AND PRACTICE
ON
SUMMARY PROCEEDINGS,
UNDER THE STATUTE PECULIAR TO THAT RELATION.
BY
DAVID McADAM,
ONE OF THE JUSTICES OF THE MARINE COURT OF THE CITY
OF NEW YORK.
WITH NUMEROUS FORMS.

NEW-YORK:
DIOSSY & COMPANY, PUBLISHERS,
86 NASSAU STREET, NEAR FULTON.
1876.

Entered, according to act of Congress, in the year 1875,
By DAVID McADAM,
In the office of the Librarian of Congress, at Washington.

TOBITT & BUNCE,
Printers,
131 William Street, N. Y.

PREFACE.

THE Statutory changes in the law regulating the Rights and Remedies of Landlord and Tenant made within the past few years, induced the author to comply with numerous requests to compile the present Treatise. The work treats, first, of the RIGHTS belonging to the respective parties growing out of the relation of Landlord and Tenant; next, the REMEDIES for the enforcement of those rights; and lastly, the LIABILITIES incidental to these remedies. The forms required in the various remedies have also been inserted in their appropriate place in the book, with the Remedy to which they belong.

Other forms affecting the relation, have also been inserted.

The general design has been to make the work one of practical, as well as of easy reference. It is hoped that the design has been accomplished.

DAVID McADAM.

NEW YORK, *December 6*, 1875.

ERRATA.

The following corrections should be made :

Page 44, bottom line, for "Keys," read "Key."

" 103, line five, for "L. R. Eq.," read "L. & Eq. R."

" 103, the title at top of page should read "Rights and Disabilities."

" 195, line 13, for "possessions," read "possession."

" 215, bottom line, for "31," read "32."

" 287, line seven, for "contents" read "contests."

TABLE OF CONTENTS.

CHAPTER I.

	PAGE
The tenure of real property	1

CHAPTER II.

The creation and division of estates. Estates of inheritance. Estates for life. Estates for years, and estates at will and by sufferance, and monthly tenancies	5
---	---

CHAPTER III.

Determination of particular estates by service of notice to quit. Tenancies at will and sufferance.....	13
---	----

CHAPTER IV.

Of the definition, nature, and validity of leases. Covenants. Renewals. Power of agents. Rights of lodgers. Effect of occupation under void lease. Legal meaning of certain terms. Recording leases. Effect of possession as notice	19
--	----

CHAPTER V.

Validity of lease as affected by fraud. Remedy in case of fraud. Election to affirm. Effect of lessee taking possession	34
---	----

CHAPTER VI.

Rights of landlord. Time of payment of rent. Mode of payment. Tender of payment. Plea of tender. Effect of tender. Appropriation of payments	47
--	----

ERRATA.

The following corrections should be made :

Page 44, bottom line, for "Keys," read "Key."

" 103, line five, for "L. R. Eq.," read "L. & Eq. R."

" 103, the title at top of page should read "Rights and Disabilities."

" 195, line 13, for "possessions," read "possession."

" 215, bottom line, for "31," read "32."

" 287, line seven, for "contents" read "contests."

TABLE OF CONTENTS.

CHAPTER I.

	PAGE
The tenure of real property	1

CHAPTER II.

The creation and division of estates. Estates of inheritance. Estates for life. Estates for years, and estates at will and by sufferance, and monthly tenancies	5
---	---

CHAPTER III.

Determination of particular estates by service of notice to quit. Tenancies at will and sufferance.....	13
---	----

CHAPTER IV.

Of the definition, nature, and validity of leases. Covenants. Renewals. Power of agents. Rights of lodgers. Effect of occupation under void lease. Legal meaning of certain terms. Recording leases. Effect of possession as notice	19
--	----

CHAPTER V.

Validity of lease as affected by fraud. Remedy in case of fraud. Election to affirm. Effect of lessee taking possession	34
---	----

CHAPTER VI.

Rights of landlord. Time of payment of rent. Mode of payment. Tender of payment. Plea of tender. Effect of tender. Appropriation of payments	47
--	----

CHAPTER VII.

	PAGE
Remedies of the landlord and of his grantees and assignees. Various remedies of the landlord. Rents dependent upon life of another. When rent has a preference over certain claims against deceased tenant. Enforcing compliance of condition. Enforcing forfeiture for breach of condition. Nuisances upon adjoining premises. Remedies of executors. Effect of judgment upon other remedies	56

CHAPTER VIII.

Rights of tenant. Right of possession and damages for withholding. Damages to evicted tenant. Assigning lease and under-letting. Who are assignees. Liability of assignee. Discharge of assignee by further assignment. Sale of leasehold estate. Right of tenant to remove fixtures. Rights of the under-tenant. Right of sub-tenant to pay original landlord. Sub-lease and sub-lessee	81
--	----

CHAPTER IX.

Remedies of the tenant, and of his assignees and personal representatives. Rescission for fraud or mistake. Other remedies of the tenant. Remedies of joint tenants. Tenant's remedy for wrongful entry.....	91
--	----

CHAPTER X.

Certain rights and disabilities growing out of the relation. Tenant estopped from disputing landlord's title. Certain attornments void. Certain provisions affecting tenant's possession. Leases to infants. Married woman. Partners and corporations	97
---	----

CHAPTER XI.

Of the obligation to repair. Right of action for breach. Extent of landlord's liability.....	104
--	-----

CHAPTER XII.

Covenants running with the land	111
---------------------------------------	-----

CHAPTER XIII.

Surrender. Agent's power to accept surrender. Accepting new lease	115
---	-----

CHAPTER XIV.

	PAGE
Eviction. Effect of eviction. Eminent domain. What the eviction affects.....	121

CHAPTER XV.

The statute relating to untenable premises. Construction of the act.....	129
--	-----

CHAPTER XVI.

Of excavations. Excavations as affecting adjoining premises. The effect of adjoining excavations upon the relations between landlord and tenant of the house inconvenienced by them	133
---	-----

CHAPTER XVII.

Party walls. Party wall not an incumbrance. Provisions of the building law upon the subject of party walls. Increasing the thickness of party and other walls. Diminishing thickness of party wall. Increasing height and depth of party wall. Repairing party wall. Taking down party wall. Rebuilding party wall	145
--	-----

CHAPTER XVIII.

Other easements. Definition of easement. Rights of way. Rights under covenant as to character of adjoining buildings.....	161
---	-----

CHAPTER XIX.

Liability to third persons. Of tenant and of landlord. Openings on sidewalk. Liability of third person to landlord....	165
--	-----

CHAPTER XX.

The statutory remedy of forcible entries and detainers.....	174
---	-----

CHAPTER XXI.

The statutory remedy known as summary proceedings to recover the possession of demised premises.....	182
--	-----

CHAPTER XXII.

PAGE

The law and practice on proceedings for forcible entries and detainers. Officers having jurisdiction. Proceedings, how instituted and conducted, with the various forms required therein.....	197
---	-----

CHAPTER XXIII.

The law and practice on summary proceedings. The object, design, and application of the statute.....	211
--	-----

CHAPTER XXIV.

The rules of construction applicable to the statutes, jurisdiction, and proceedings thereafter.....	216
---	-----

CHAPTER XXV.

Judicial officers having jurisdiction.....	219
--	-----

CHAPTER XXVI.

Proceedings for non-payment of rent.....	221
--	-----

CHAPTER XXVII.

Proceedings for holding over.....	230
-----------------------------------	-----

CHAPTER XXVIII.

The affidavit in said proceedings, and its requisites, with forms,	237
--	-----

CHAPTER XXIX.

The summons, its form. The service and proof of service.....	251
--	-----

CHAPTER XXX.

Practice upon return day. Objections to sufficiency of papers. Filing counter affidavit. Amendments. Demanding trial by jury. Adjournments, with forms.....	262
---	-----

CHAPTER XXXI.

Proceedings upon trial. The jury. Evidence. Judges charge. Deliberations of the jury. Verdict and its effect.....	274
---	-----

CHAPTER XXXII.

	PAGE
Final determination and its effect. Warrant. Staying execution of warrant. Redemption. Forms, &c.	284

CHAPTER XXXIII.

Injunctions to enjoin summary proceedings.....	299
--	-----

CHAPTER XXXIV.

Proceedings under the statute relating to bawdy houses and illegal trades, with the forms required in said proceedings..	303
--	-----

CHAPTER XXXV.

Certiorari to review proceedings on forcible entry and detainer, and to review adjudications under the statute relating to summary proceedings with the forms, required thereupon..	314
---	-----

CHAPTER XXXVI.

Review of summary proceedings by the county court upon appeal from adjudication of justices of the peace. Law and practice upon such appeals, with forms.....	324
---	-----

CHAPTER XXXVII.

Squatter act and proceedings thereunder, with forms.....	346
--	-----

CHAPTER XXXVIII.

Liabilities incidental to remedies. Liability of justice and of parties.....	350
--	-----

CHAPTER XXXIX.

Chapter of forms.....	357
-----------------------	-----

APPENDIX.

	PAGE
Party walls.....	373
Affidavit upon appeal.....	376

INDEX OF FORMS.

No.	PAGE
1. One month's notice to quit.....	16
2. All the forms in forcible entry and detainer proceedings will be found in Chapter XXII. page.....	197 to 210
3. Demand for rent by service of three days' notice.....	224
4. Affidavits in summary proceedings.....	245 to 249
5. Summons in summary proceedings.....	253 to 258
6. Endorsement thereon	258
7. Proof of service of summons.....	260 and 261
8. Counter affidavit, in summary proceedings.....	269
9. Venire for jury, summary proceedings.....	271
10. Juror's summons, summary proceedings.....	272
11. Affidavit to adjourn trial.....	272
12. Oath to jurors.....	278
13. Oath to officer having charge of jury.....	282
14. Judgment.....	285
15. Bonds under various sections of the act.....	289 to 292
16. Warrant.....	293 to 295
17. Affidavits in case of bawdy house.....	309 to 311
18. Summons in like cases.....	311
19. Affidavit in case of illegal trades.....	312
20. Summons in like case.....	313
21. Endorsement thereon.....	313
22. Judgment and warrant in such cases.....	313
23. Petition for certiorari.....	315
24. Certiorari to remove proceedings.....	316
25. Bond on allowance of certiorari.....	316
26. Return of justice to certiorari.....	317
27. Petition for certiorari. Summary proceedings.....	320
28. Order directing certiorari. Summary proceedings.....	321

No.		PAGE
29.	Writ of certiorari to review summary proceedings.....	321
30.	Return of justice. Summary proceedings.....	322
31.	Order of reversal. Summary proceedings.....	322
32.	Writ of restitution. Summary proceedings.....	323
33.	Docket of justice of the peace. Summary proceedings....	324
34.	Warrants by justices of the peace. Summary proceedings..	325
35.	Notice of appeal to county court. Summary proceedings..	328
36.	Security upon such appeal. Summary proceedings.....	330
37.	Return of justice in summary proceedings.....	335
38.	Order for amended return.....	337
39.	Notice to quit under squatter act.....	347
40.	Complaint under squatter act.....	348
41.	Warrant under squatter act.....	348
42.	Index to chapter of forms.....	357
43.	Affidavit for appeal to county court.....	376

INDEX TO THE CHAPTER OF FORMS.

(Chap. 39, *post*, p. 357.)

No.		PAGE
1.	Subpœna.....	357
2.	Proof of service.....	358
3.	Order for attachment against witness.....	358
4.	Attachment against witness.....	359
5.	Complaint in ordinary civil action against tenant for rent,	359
6.	Complaint in ordinary civil action against surety of tenant for rent	360
7.	Lease, with covenants.....	361
8.	Other covenants for lease.	362
9.	Security for rent to be endorsed on lease.....	363
10.	Assignment of lease.....	364
11.	Mortgage on lease, interest, and insurance clause.....	365
12.	Bond to accompany said mortgage	367
13.	Party wall agreement (two forms).....	368, 369
14.	Permission to insert beams in adjoining house.....	370
15.	Builder's contract.....	371
16.	Different forms of acknowledgment.....	373

THE
RIGHTS, REMEDIES, AND LIABILITIES
OF
LANDLORD AND TENANT.

CHAPTER I.

THE TENURE OF REAL PROPERTY.

THE constitution of the State declares that "The people, in their right of sovereignty are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of this State ; and all lands the title to which fails from a defect of heirs, reverts or escheats to the people" (*Const.* 1846, art. 1, § 11), and "all feudal tenures with their incidents are declared abolished" (*Ib.* art. 1, § 12), and "all lands within the State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates" (*Ib.* art. 1, § 13). Various statutes, prior to the Constitution of 1846, contained similar provisions (1 *Jones & Varick*, 44 ; 1 *R. L.* 70 ; 1 *R. S.* 714, § 1 ; 1 *Edm. R. S.* p. 666, §§ 1, 3). The ancient English principle of feudal tenures is supposed to have (theoretically at least) existed in this State during its colonial existence, but Judge STORY

says: "In all the colonies, the lands within their limits were by the very terms of their original grants and charters, to be holden of the Crown in fee and common socage, and not *in capite* or by knights service. They were all holden, either as the manor of East Greenwich in Kent, or of the manor of Hampton Court in Middlesex, or of the castle of Windsor in Berkshire. All the slavish and military part of the ancient feudal tenures was thus effectually prevented from taking root in the American soil; and the colonists escaped from the oppressive burdens, which, for a long time, affected the parent country, and were not abolished until after the restoration of Charles the Second.* Our tenures thus acquired a universal simplicity; and it is believed that none but freehold tenures in socage ever were in use among us.† No traces are to be found of copyhold, or gavelkind, or burgage tenures. In short, for most purposes, our lands may be deemed to be perfectly allodial, or held of no superior at all; though many of the distinctions of the feudal law have necessarily insinuated themselves into the modes of acquiring, transferring, and transmitting real estates" (*Story on the Const.* vol. 1, § 172).

The early history of English tenures discloses many important features of distinction between the ancient and present condition of lessees of land, properly so called.

* By an act of parliament of April 25th, 1660, all military tenures were abolished.

† By socage tenure is meant a fixed rent or service, not military nor liable to change by the will of the lord. Tenure in socage embraced those who were the actual workers, the men who plowed and tilled the grounds which they occupied. The etymology of the word *socage* has been the subject of dispute. Littleton derives it from the Latin word *soca*, a plow. His theory is that a great number of tenants of the lord were bound to labor a certain number of days in the year, in plowing and sowing the domains of the lord; and, because their services were performed with the plow, their tenure was called tenure in socage; other law writers have derived the word socage from the Saxon word *soc*, which was used to express liberty or privilege; and upon that theory, have claimed that the word socage was used to indicate a free or privileged tenure.

At first, the tenant appears to have been regarded rather as a bailiff or servant of the lord, and accountable for the profits, than as having any direct property in the land. By degrees, however, he assumed a more independent position, and acquired a defined, though limited, interest in the soil itself, rendering provisions, grain, or other agricultural produce, as a recompense for the enjoyment; a circumstance to which we may now refer the adoption in modern leases of the words "and to farm let;" the word *farm* or *fearme* being an old Saxon term, signifying provisions (1 *Platt on Leases*, p. 2), or as Woodfall translates it, "Farm, ferme, fearme, *firma*, is derived of the Saxon word 'feorman' to feed or relieve; because in ancient time they reserved upon their leases cattle and other victual and provision for their sustenance" (*Woodfall's L. & T.* p. 5).

In England, the subject to whom the king granted lands, as they were to be holden of him by some prescribed service, was called his *tenant*; the lands or possessions, the *tenement*; and the manner in which they were held the *tenure*, although literally, the word *tenure* simply signifies a holding.

By the statute of this State, tenancies are divided into estates of inheritance, for life, for years, and at will, and by sufferance, and although the word "tenancy" implies a holding from some superior lord, yet the more ordinary use of the word is intended to designate some estate or interest in lands, less than a fee, held by one person called a lessee, of another called the lessor, subject to some rent and accompanied by certain obligations of the lessor and lessee respectively. Upon such a holding arises the ordinary relation of landlord and tenant referred to in the modern books; and it is to the rights, remedies and liabilities belonging to and growing out of such a relation, that the present treatise is addressed.

It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king is the original proprietor, or lord paramount of all the land in the kingdom, and the true and only source of title (2 *Bl. Com.* 42-104), and any reader desiring to master the intricacies of the ancient system of tenures, may be gratified by reading the history of their military origin as explained by Sir William Blackstone, in his Commentaries (Book 2, p. 42-104), in which the reasons which gave rise to the rule that all land is held of the sovereign are fully explained. In entering, however, upon a view of the American law of real property, it can serve no practical purpose, to go into all intricacies of the feudal law. The early settlers of this country left that law behind them ; or, if any relic of it survived till the revolution, all was then swept away. The *feudal* law was a political system which never made any part of American institutions (1 *Hilliard on Real Prop.* 36). After the separation of the colonies from the mother country, it was after much discussion settled in and by the articles of confederation, between the thirteen States, that the people of those States respectively in their right of sovereignty, were deemed to possess the original and only source of title to lands within their domain (*Hildreth's U. S.*, vol. 3, p. 395-400, articles of Confed., 2-9). In the territories ceded to the Federal Government, after the signing of the articles of Confederation, the people of the United States, in their right of sovereignty, are deemed to possess the original and only source of title, so that in the Territories of the West, and in States formed out of such Territories, the source of title, as a rule, is by grant evidenced by warrant or patent from the United States, issued by that department of the Federal Government known as the Land Office, pursuant to acts of Congress making provision for the sale of public lands.

CHAPTER II.

THE CREATION AND DIVISION OF ESTATES.

By statute (1 *Edm.* p. 670, § 1), estates in land are divided into

1. Estates of inheritance ;
2. Estates for life ;
3. Estates for years ; and
4. Estates at will and by sufferance ; and the nature and quality of these estates will be considered in the order stated.

I.

Of estates of inheritance.

In this State, estates of inheritance are divided into fees simple, or absolute fees, and defeasible or conditional fees (1 *Edm. R.* p. 670, § 2), and a fee simple is the highest estate in land, and a conditional fee is one which has a qualification subjoined called a condition precedent or subsequent ; a precedent condition is one which must take place before the estate can vest, and a subsequent condition is one which acts upon an estate already created or vested, and renders it liable to be defeated.

Estates of inheritance and for life, continue to be denominated estates of freehold ; estates for years, chattels real ; and estates at will or by sufferance, chattel interests (1 *Edm. R.* p. 671, § 5).

For the balance of the statute relating to the creation and division of estates, see 1 *Edm. R. S.* pp. 670 to 676, and for the law as to conditional or qualified fees, see Gerard on Titles (2d *ed.* pp. 122 to 128).

II.

Of estates for life.

An estate for life exists where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one, in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur autre vie* (*Litt.* § 36; 2 *Bouvier's Law Dic.* tit. "TENANT," sub. 8).

An estate for life is a freehold estate, but not of inheritance.

An estate during the life of a third person is deemed a freehold only during the life of the grantee or devisee, but after his death it is deemed a chattel real (1 *Edm. R. S.* p. 671, § 6).

A conveyance made by a tenant for life or years of a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate, or interest which such tenant could lawfully convey (*Id.* p. 690, § 145).

Incidents of the estate.

The tenant for life can not be affected by any act of the remainder man (*Doe v. Thompson*, 5 *Cow.* 371), nor can the tenant for life by any act of his prejudice the remainder man (*Jackson v. Luquere*, *Id.* 221), and the possession of the tenant for life is not adverse to the remainder man, and the latter may make a valid conveyance notwithstanding such possession (*Grant v. Townsend*, 2 *Hill*, 554), and the tenant for life is entitled to reasonable estovers, that is wood from off the land, for fuel, fences, agricultural erections and other necessary improvements (4 *Kent's, Com.* 73; 5 *Barb.* 339; 26 *Id.* 409; 1 *Paige*, 573; 3 *Sandf. Ch.* 601), but has no right to dig up and use soil for the manufacturer of bricks for sale (26 *Wend.* 115; 2 *Hill*, 157); he is bound to pay

interest on incumbrances, ordinary taxes, and such like charges for the purpose of preserving the estate from loss and forfeiture (3 *Edw. Ch.* 312 ; 4 *Kent.* 75 ; 2 *Brad.* 311 ; 22 *N. Y.* 200), and is liable for waste (4 *Kent's Com.* 77 ; 2 *Edm. R. S.* p. 344, § 1, and 1 *Id.* p. 701, § 8). Tenants for life may make under-leases, which will possess all the rights and privileges incident to the original estate ; subject of course to be defeated by the death of the person upon whose life the first estate depends. A tenant *pur autre vie* who continues in possession without the consent of the owner after the determination of the life estate, is at common law a tenant by sufferance, but by statute has been declared a trespasser (*Livingston v. Tanner*, 14 *N. Y.* 64 ; and see 8 *Abb. N. S.* 37).

Remedy on lease for life.

Any person having any rent due upon any lease for life or lives, may have the same remedy to recover such arrears, by action of debt, as if such lease were for years (1 *Edm. R. S.* p. 697, § 19).

Liability for holding over after determination of certain estates.

Every person, who, as guardian or trustee for an infant, and every husband seized in right of his wife only, and every other person having an estate determinable upon any life or lives, who, after the determination of such particular estate, without the express consent of the party immediately entitled after such determination shall hold over and continue in possession of any lands, tenements, or hereditaments, shall be adjudged to be a trespasser ; and every person, and his executors and administrators, who shall be entitled to such lands, tenements or hereditaments, upon the determination of such particular estates, may recover in damages against every such person so holding over, and against his, her, or their executors or administrators, the full value of the profits received during such wrongful possession (*Id.* p. 700, § 7).

III.

Of estates for years.

A general occupation of premises is treated as from year to year whenever the reservation of rent or other circumstances indicate an annual holding (*Taylor's L. & T.* §§ 54, 55), but not where the agreement for occupation provides for occupation for a shorter period; as for example, a single quarter or month (*Wilkinson v. Hall*, 3 *Bing. N. C.* 508; *Blamenberg v. Myres*, 32 *Cal.* 93; *Secor v. Prectana*, 37 *Ill.* 525), and a statute applicable to the city of New York, provides that

“Agreements for the occupation of lands or tenements in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence, and the rent under such agreement shall be payable at the usual quarter days for the payment of rent in the said city, unless otherwise expressed in the agreement” (1 *Edm. R. S.* p. 695, § 1).

In the city of New York, a tenant who holds over, and remains in possession of premises leased to him at a certain rent, with the assent of the owner, after the expiration of the term, without any new agreement as to the rent, becomes a tenant from year to year, and liable for the rent, at the same rate, up to the first of May next following (*Witt v. The Mayor*, 5 *Robt.* 248; and see *Hunt v. Wolfe*, 2 *Daly*, 298; *Conway v. Starkweather*, 1 *Den.* 113); and the rule seems to be, that where a tenant holds over after the expiration of his term, the law will at the option of the landlord, imply a new hiring upon the terms and conditions specified in the former lease (*Brewer v. Knapp*, 1 *Pick.* 332; *Ellis v. Paige*, *Id.* 43; *Fronty v. Wood*, 2 *Hill [S. C.]* 367; *Moore v. Beasley*, 3 *Ham.* 294; *Diller v. Roberts*, 13 *S. & R.* 60; *Bacon v. Brown*, 9 *Conn.* 334; *Dorrill v. Stevens*, 4 *McCord*, 59); and the rule is said

to be the same where the holding over is personal or by tenants placed there by the tenant (*Bacon v. Brown*, 9 *Conn.* 334).

Where premises, situate in the city of New York, were demised for a term over six and less than nine months, at the yearly rent of three hundred dollars, payable quarterly, it was held, that the time of the first payment of rent was not deferred until three months from the date of the lease, but that the rent was payable on the usual quarter days for the payment of rent in the city, happening after the date of the lease (*Wolf v. Merritt*, 21 *Wend.* 336); and see the construction put upon somewhat similar terms contained in a lease of lands outside of the city of New York (*Curtis v. Miller*, 17 *Barb.* 477), and as to implied tenancies, see *Marquart v. La Varge* (5 *Duer*, 559).

Where possession is taken under a parol lease void as to the term, if the premises are situate in the city of New York, the statute designates its termination (*Taggard v. Roosevelt*, 2 *E. D. S.* at p. 105), and as to presumption as to the term, see *Clarke v. Richardson* (4 *E. D. S.* 173).

Definition of the word "year."

Whenever the word year or years is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument, the year intended to be taken shall be taken to consist of 365 days; a half year of 182 days; and a quarter of a year of 91 days; and the added day of a leap year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day (1 *Edm. R. S.* p. 563, § 3).

Monthly tenancies.

A renting of premises by the month, and which is to be from month to month, can bear but one interpre-

tation, viz. : that, to be continued, it must be renewed monthly ; and that to terminate the tenancy, a month's notice is not necessary (*The People v. Goelet*, 64 *Barb.* 476). In the case just cited, the contract was for the letting of a store in Third Avenue, for the month of August, and the Court said, "The contract for August was to the first of September. The receipt given on the first of September was for rent in advance for September. It contained no agreement for extending it beyond that time, and left the contract as originally made to be from month to month" (*Ib.* at 481, and see *The People ex rel. Gledhill v. Schackno*, 48 *Barb.* 551).

Under a hiring from month to month, the acceptance of a second month's rent by the landlord merely operates as a renewal of the tenancy for another month upon the same terms, and either party to such a tenancy may determine it at the end of any month, without notice (*Gibbons v. Dayton*, public admr., 4 *Hun.* 451, reported in full in Chapter IV. *post*).

Where a monthly tenant occupies rooms of a landlord, with an agreement to pay rent in advance, and leaves the latter part of the month, he is not liable for the rent of the subsequent month (*Fash v. Kavanagh*, 24 *How.* 347).

Construction of the word "month."

Whenever the term "month" or "months" is, or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar, and not a lunar month, unless otherwise expressed (1 *Edm. R. S.* p. 563, § 4).

IV.

Of estates at will and by sufferance.

Tenancy at will is said to exist where lands or tenements are let by one man to another, to have and

to hold of him at the will of the lessor ; by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain sure estate ; for the lessor may put him out at what time it pleaseth him (*Co. Lit.* vol. 1, p. 637). The difference between a tenant at will and a tenant by sufferance is, that a tenant at will is always by right, and a tenant by sufferance entereth by lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at first came in by lawful demise, and after his estate ended continueth his possession and wrongfully holdeth over (*Ib.* p. 649) ; in short, any one who continues in possession without agreement, after a particular estate is ended, is a tenant at sufferance (12 *Barb.* at p. 484) ; but such a tenancy will not attach, unless the landlord negligently omits to put the over-holding tenant out, within a reasonable time after the expiration of his term, for the relation exists only by the laches of the landlord (11 *Wend.* 617). A tenancy at will can scarcely exist in the city of New York (*The People v. Goelet*, 64 *Barb.* at p. 481), unless, perhaps, the intention to create such a tenancy is declared in and by the words of the demise (*Post v. Post*, 14 *Barb.* 253), for if the agreement under which the premises are held does not particularly specify the duration of such occupancy, it shall be deemed valid, by force of the statute (*vide ante*, p. 8) until the first day of May next after possession under such agreement shall commence. In *Rowan v. Lytle* (11 *Wend.* 617), it was held that the tenancy by sufferance was created not by the consent, but by the laches of the owner, and that at the expiration of the lease, the parties stand in some relation to each other ; that when the possession is continued without the consent of the landlord, the law says the person in possession is tenant at sufferance. But for the purpose of giving the statute a fair construction and beneficial operation, no notice to quit is held to be necessary, unless the landlord has unnecessarily delayed his proceedings ; and that the object

of the Legislature will be best promoted by holding that such notice is not necessary, unless the landlord has permitted the tenancy to continue for such a length of time as to imply assent, and that a delay to be called *laches* ought to be of longer continuance than three months, and should be accompanied by some evidence of negligence, and that if the landlord in such a case afterwards accepts rent, the tenancy will be converted from sufferance into one from year to year, and in *Conway v. Starkweather* (1 *Den.* 113), it was held that where a tenant under a demise for a year or more holds over after the end of the term, without any new agreement with the landlord, he may, at the election of the landlord, be treated either as a trespasser or a tenant holding upon the terms of the original lease, and that distraining for rent payable after the expiration of the original term, is an election by the landlord to consider him a tenant, and that the over-holding tenant being a wrongdoer has no such election, and after holding over, he is not at liberty to deny that he is in as tenant, if the landlord chose to hold him to that relation (1 *Denio*, 113; 5 *Robt.* 248; 2 *Daly*, 298).

See the comments on the rule laid down in *Rowan v. Lynde* (11 *Wend.* 616), in the note to § 718 of *Taylor's L. & T.* 5th ed.

CHAPTER III.

DETERMINATION OF PARTICULAR ESTATES BY SERVICE
OF NOTICE TO QUIT.

A notice to quit will be taken to be a good notice if the tenant could not mistake its nature ; but the court will not construe a notice in a manner at variance with its express language, even if the effect of adhering to such language would be to make the notice bad. So notices dated in the wrong year (*Duke of Bedford v. Kightley*, 7 *T. R.* 63), or misdescribing the premises (*Cox v. Doe*, 4 *Esp.* 185), or their situation have been held good (*Armstrong v. Wilkison*, 12 *A. & E.* 743), and under the statute of this State, notice served by the landlord upon a tenant at will to terminate his tenancy, takes effect in thirty days after service, and the specification therein of a day on which the time will expire, which will be less than thirty days from time of service, will not vitiate the notice (*Burns v. Bryant*, 31 *N. Y.* 453 ; *People v. Shackno*, 48 *Barb.* 551), and a notice to remove in thirty days, served in a month which contained only thirty days, was held to be a month's notice (*McGuire v. Ulrich*, 2 *Abb.* 28). Notice to quit is never required where the parties have, by mutual agreement, fixed the terms on which the lease is to terminate (*Allen v. Jaquish*, 21 *Wend.* 628) under a parol agreement for renting for premises for one month from August 1, 1866, and for each successive month thereafter until the landlord should want the premises for his own use, whereupon the tenancy should expire ; *held*, that notice of thirty days was not necessary to terminate the tenancy (*People v. Schackno*, 48 *Barb.* 551), and a tenant hiring from month to month is not

entitled to notice to quit (*Gibbons v. Dayton*, 4 *Hun.* 451). The object of the statute is to inform the tenant when his term expires; in other words, when he must quit the possession. In case of tenancy for a year, the lease contains the information, and the statute does not require any other notice (*Rowan v. Lytle*, 11 *Wend.* at p. 619), a tenant for the life of another who, without the consent of the owner, continues in possession after the determination of the life estate, is under 1 *R. S.* 749, § 7, a trespasser; and is not entitled to notice to quit before action (*Livingston v. Tanner*, 14 *N. Y.* 64; *Torrey v. Torrey*, 14 *N. Y.* 430); one entering under a parol agreement for a lease, the rent to be paid monthly, who refuses to accept the lease becomes a common-law tenant at will or by sufferance, and is liable to be ejected immediately; but if the parol agreement was for a term exceeding one year, and, therefore, void by the statute, the tenancy after the acceptance of rent is from month to month, and the tenant is entitled to a month's notice (*Anderson v. Prindle*, 23 *Wend.* 616; aff'g 19 *Id.* 391.) When a tenant is in possession under a parol agreement void by the statute of frauds, and has occupied for a year, paying the rent monthly, this creates a tenancy from month to month which can only be terminated by a month's notice to quit, expiring with the end of some month, reckoning from the beginning of the tenancy (*The People v. Darling*, 47 *N. Y.* 666), and if the premises are situated in the city of New York, and the parol lease is void as to the term, the statute treats it as a tenancy for no specified term, and designates its termination to be on the first of May following (*Taggard v. Roosevelt*, 2 *E. D. S.* at p. 105).

A renting of premises by the month,

and which is to be from month to month, can bear but one interpretation, viz. : that, to be continued, it must be renewed monthly, and to terminate the tenancy no

notice is necessary (*The People v. Goelet*, 64 *Barb.* 476 ; see also *Gibbons v. Dayton*, 4 *Hun.* 451).

Tenancy from year to year.

A tenancy from year to year is, under the provision of the revised statutes, for the summary dispossession of tenants, a tenancy for one or more years. Therefore, a tenant from year to year may, after the expiration of his term, that is, at the expiration of each year he holds over the original term, be proceeded against in a summary manner for his removal from the premises, without any notice to quit. There is no such estate as a tenancy "at will from year to year ;" its assertion is a solecism. Six months' notice to quit may be necessary to authorize the removal of a tenant, from year to year, where there is a valid lease in writing for the term of one year, *and thereafter*, until one or the other elects to terminate it (*Park v. Castle*, 19 *How.* 29 ; and see *Nichols v. Williams*, 8 *Cow.* 13 ; *Post v. Post*, 14 *Barb.* 253 ; compare *Nowlan v. Trevor* 2 *Sweeny*, 67 ; and *Paysley v. Aiken*, 11 *N. Y.* 494).

Tenancy at will or by sufferance.

At common law, neither a tenant at will or by sufferance was entitled to notice to quit before he could be ejected, although a demand of possession was always required (*Taylor's L. & T.* § 63). The statute, however, provides, that "wherever there is a tenancy at will, or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom" (1 *Edm. R. S.* p. 696, § 7).

In *The People v. Fields* (1 *Lansing* at p. 238), it was held that this statute relating to notices to quit does not apply to tenancies at will, as such tenancies were known at common law, and that it applies only where

the conventional relation of landlord and tenant exists between the parties, and that in the so-called common-law tenancies where such relation did not exist, the former common-law right of re-entry without notice remains (see 1 *Lansing*, at p. 238; 2 *Cai.* 169; 9 *Johns.* 267; 13 *Johns.* 106; *Id.* 235; 1 *Wend.* 418). And at common law, a tenancy at sufferance might be determined by mere entry. No demand of possession or other notice was necessary (*Livingston v. Tanner*, 12 *Barb.* at p. 484; *affd.* in 14 *N. Y.* 64).

Form of notice to quit.

To Richard Roe, tenant:

Please to take notice, that you are hereby required to quit, surrender, and deliver up possession of the rooms on _____ floor, in premises known as Number _____, _____ street, in the city of New York, and to remove therefrom on the first day of _____, 187 , pursuant to the provisions of the statute relating to the rights and duties of landlord and tenant.

Dated New York, _____ 187 .

JOHN DOE, landlord.

The notice need not state the day upon which the tenant is to quit, but it is sufficient to give notice to quit at the expiration of the current year (4 *D. & R.* 248; 5 *A. & E.* 350; 7 *Q. B.* 577; 31 *N. Y.* 453; 48 *Barb.* 551); and if the notice be directed to the tenant by a wrong Christian name, and he keeps it, he waives the objection, and will be bound by it (*Doe v. Spiller*, 6 *Esp.* 70).

Notice, how served.

The statute provides that such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the premises; or, if the tenant can not be found, and there be no such person residing on the premises, such notice may be served by

affixing the same on a conspicuous part of the premises, where it may be conveniently read (1 *Edm. R. S.* p. 696, § 8).

Rights of landlord after notice.

At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law, to remove such tenant, without any further or other notice to quit (*Id.* § 9).

Penalty on tenant not yielding possession after giving notice.

If any tenant shall give notice of his intention to quit the premises by him holden, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant, his executors or administrators, shall, from thenceforward, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be levied, sued for, and recovered, at the same time and in the same manner as the single rent; and such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid (1 *Edm. R. S.* 697, § 10; and see *Hall v. Ballentine*, 7 *Johns.* 536).

Penalty on tenants for holding over after notice to quit.

If any tenant, for life or years, or if any other person who may have come into the possession of any lands or tenements, under or by collusion with such tenant, shall wilfully hold over any lands or tenements after the termination of such term, and after demand made and one month's notice in writing, given in the manner hereinbefore prescribed, requiring the possession thereof by the person entitled thereto, such person so holding over shall pay to the person so kept out of possession, or his representatives, at the rate of double

the yearly value of the lands or tenements so detained, for so long a time as he shall so hold over or keep the person entitled out of possession ; and shall also pay and remunerate all special damages whatever, to which the person so kept out of possession may be subjected by reason of such holding over ; and there shall be no relief in equity against any recovery had at law under this section (1 *Edm. R. S.* p. 697, § 11).

CHAPTER IV.

OF THE DEFINITION, NATURE, AND VALIDITY OF
LEASES.

The act of granting an estate is called a *demise*, and the instrument or agreement by which it is granted is a lease (2 *Bouv. Inst.* 254). A lease at the common law is a grant or assurance of a present or future interest, for life, for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant or assurance proceeds. A pecuniary rent, or other recompense, though not essential to the contract, is usually reserved, payable yearly, or at other stated times during the term. The party granting the lease is called the lessor ; he to whom it is granted, the lessee. If the instrument be executed by the lessee only, it is not a lease (*Platton Leases*, p. 9).

To make such a contract, there must be a lessor able to grant the land ; a lessee capable of accepting the grant ; and a subject-matter capable of being granted (2 *Bouv. Inst.* 254). No special form of words is necessary to constitute a lease. Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession, and the other come into it for a determinate time, are of themselves sufficient ; and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose ; for a lease for years being a contract for the possession and profits of lands on the one side, and a recompense of rent or other income on the other, if the words made use of, are sufficient to prove such a contract, in what form soever they are introduced, or

however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly (*Fawcett's L. & T.* pp. 71, 72). A lease may be made by correspondence, in which one party offers to take on certain terms, fully and definitely stated, and the other unconditionally accepts such offer (*Chapman v. Bluck*, 4 *Bing. N. C.* 187; 7 *L. J.*; *C. P.* 100; see 1 *Q. B.* 506; 10 *L. J.*; *Q. B.* 193); but when the parties are not together, the acceptance must be manifested by some appropriate act, and the manifestation put in the proper way of reaching the proposer; a mere mental determination to accept, not indicated by speech, or put in course of indication by act, is not an acceptance (*White v. Corlies*, 46 *N. Y.* 467).

It will be proper here to point out the difference between an agreement for the lease and the lease itself. When an agreement for a lease contains words of present demise, and there are circumstances from which it may be collected that the tenant should have an immediate legal interest in the term, such an agreement will amount to an actual lease; but although words of present demise are used, if it appear on the whole that no legal interest was intended to pass, and that the agreement was only preparatory to a future lease to be made, the construction will be governed by the intention of the parties, and the contract will be held to amount to no more than an agreement for a lease (2 *Bouv. Inst.* 254).

An agreement to construct a wharf, to be occupied when finished by grantee, at a stipulated rent, accompanied by words of present demise, operates as a lease (*People v. Kelsey*, 14 *Abb. Pr.* 372; 38 *Barb.* 269). Where there are apt words of demise it is a lease, notwithstanding there is added a covenant for a further lease, so held where possession was held under it (*Jackson v. Kisselbrack*, 10 *Johns.* 336; *Jackson v. Van Hoesen*, 4 *Cow.* 325; and see *Hallett v. Wylie*, 3 *Johns.* 44; 5 *Ib.* 74; 1 *Bosw.* 28; 8 *N. Y.* 44; 5 *T. R.*

163); but an agreement to give a lease is not a lease, unless accompanied by actual possession (*Becker v. Deforest*, 1 *Sweeny*, 528), particularly where it is manifest that further conveyances or instruments were contemplated (*Jackson v. Moncrief*, 5 *Wend.* 26).

The creation of tenancies is frequently evidenced by no other writing than what is commonly called a receipt, signed by the landlord or his agent, and accepted by the tenant, and the question has been frequently mooted whether these receipts in any case amounted in law to a contract between the parties.

The courts in analogous cases, while adhering to the general rule that a simple receipt is nothing more than an admission amounting to *prima facie* evidence of the facts stated therein, and open to contradiction or explanation by parol (*Ryan v. Ward*, 48 *N. Y.* at p. 207), have, however, limited the rule to receipts technically and properly so called, and have held that where the receipt went further and embodied a contract, that that portion of it was not open to contradiction by parol (*Id.*; and see also *Berrian v. The Mayor*, 4 *Robt.* 539; *Coon v. Knapp*, 8 *N. Y.* 402; *Kellogg v. Richards*, 14 *Wend.* 116; *Graves v. Friend*, 5 *Sandf.* 568; *Niles v. Culver*, 8 *Barb.* 205); where, therefore, a writing besides containing the words belonging to a simple receipt, embraces the ingredients of a contract, *e. g.*, the tenure, terms, and conditions of a hiring, it is in these particulars a contract, not open to contradiction by parol proof, in the absence of fraud or mistake.

The question presented itself in the case of *Gibbons v. Dayton*, public admr. of Anna Maria Merriam, decd. (4 *Hun.* 451), on appeal from a judgment in favor of the plaintiff, entered upon the report of a referee.

The claim was for rent of the second floor of the premises known as No. 165 Bleecker street, from May 1st, 1873, to April 1st, 1874. "It appeared from undisputed evidence that Mrs. Merriam had resided in the premises a number of years prior to her death; that

she leased the premises ; that no lease was ever made between herself and the plaintiff, other than in the form of receipts for rent, of the following description :

“Rent must be paid invariably in advance, on the first day of the month.

“NEW YORK, Sept. 1st, 1871.

“Received from Mrs. Mary Merriam the sum of sixty dollars, for one month’s rent only, in advance, for second floor rooms in house No. 165 Bleecker street, ending October 1, 1871, at noon. It being expressly understood between us, the tenant and agent, or landlord mentioned in this receipt, that this term of hiring and letting is for one month only, and will expire as aforesaid. \$60. THOMAS J. GIBBONS.”

The court [New York Supreme] delivered the following opinion :

DAVIS, P. J.—The appellant is public administrator, and as such was appointed administrator of the estate of one Anna Maria Merriam, deceased. The respondent presented a claim for rent against the estate, which being disputed, was submitted to reference with the approval of the surrogate, in conformity to the statute in such case made and provided. Mrs. Merriam, the intestate, was the tenant of the respondent from month to month ; she had been accustomed to receive, on payment of the monthly rent at the beginning of each month, an instrument acknowledging the receipt of the rent *and expressing the term and nature of the tenancy*. Such an instrument was executed and delivered to her about the first of April, 1873, on payment of the rent for that month. About the first of May, Mrs. Merriam was taken sick and went to the house of a friend, where she became so ill that she was unable to return to her rooms, and she remained at her friend’s till her death, which occurred on the 6th of June, 1873. Her furniture and other personal property remained at the rooms leased to her by respondent until about the 29th or 30th of July, 1873. About the 28th of July, the

appellant received notice of the death of Mrs. Merriam, and was on that day appointed her administrator, and on the 29th or 30th of July removed all articles of any apparent value from the premises previously occupied by her, and about the same time sent the keys of the rooms to the place of business of respondent, and left them with a boy in the office, with a message that they were the keys of such rooms. The respondent on learning that the keys had been sent to his office, refused to receive them, and sent them back to the office of the appellant. The clerk of the appellant also refused to receive them. On the 16th of February following, the respondent entered the rooms, cleaned them out and repaired them, removing the articles of no value left in them, to the cellar of the building. The referee held, that the intestate was tenant from month to month, that there had been no lawful surrender of the premises, and that the appellant was liable for the rent down to the time of the entry of respondent on the 16th of February, 1874, at the rate of sixty dollars per month, and directed judgment accordingly.

It is very clear that the tenancy was from month to month. Neither party was bound to give any notice to the other in order to terminate the tenancy at the expiration of any month. *The landlord could have removed the tenant by summary proceedings,* without notice; and so the tenant could lawfully have left the premises at the expiration of any month, without notice, and without being bound to pay further rent (People *ex rel.* Gledhill *v.* Schackno, 48 Barb. 551; People *v.* Goelet, 14 Abb. Pr. N. S. 130). The death of Mrs. Merriam did not change the character of the tenancy, and the appellant is not liable beyond the obligations that rested and would have remained upon her had she continued to live and retain her possession down to the day when appellant removed the property and sent the keys to the respondent's office. She would in that case have been chargeable with rent for the

months of May, June, and July; *but her tenancy would have terminated with the month of July.* The appellant acted promptly and with apparent good faith. He was appointed administrator on the 28th of July, and on the next day, or on the 30th, moved the furniture and everything of value from the premises, and sent the keys to the landlord. *This was a complete termination of the tenancy, and full notice that the term would not be renewed for another month.* A few articles were left in the rooms, but they seem from the evidence to have been nothing more than worthless things, which the referee finds to have been valueless. The rooms were excessively dirty, but the litter and filth, and worthless fragments and articles which tenants are often accustomed to leave behind them, have never been held to constitute a continuance of the tenancy. The landlord's remedy, if any, for such an injury, is quite different from treating the tenancy as renewed by the omission to carry everything away, whether valuable or not. The referee has charged the administrator with rent after the month of July, on the ground that there was no formal surrender by him of the premises to the landlord. No form was necessary under the facts of the case, beyond a removal at or before the expiration of the month, and the restoration of the keys to the landlord so that he could enter upon possession. The case is not like that of *Pugsley v. Aiken* (11 N. Y. 494), where the lease was for "one year and an indefinite period thereafter," *for in this case the express terms of the lease are* "that this term of letting and hiring is for one month only, and will expire" at noon on the first day of the following month. There should have been a recovery, therefore, only for the rent of the months of May, June, and July, with interest on each month's rent from the time it was payable. The judgment should be reversed, and a new trial granted, with costs of the appeal to the appellant, unless the respondent shall stipulate to modify the judg-

ment by reducing it to the rent for the months above named and interest, in which case it may be affirmed as modified, without costs to either party on this appeal as against the other." DANIELS and BRADY, JJ., concurred.

In *Blumenberg v. Myres* (32 *Cal.* 93) the court said: "The doctrine that where the lessee holds over and the lessor receives rent accruing after the expiration of the term, a new tenancy arises for a further term, subject to the covenants and conditions of the original lease, is true as a general rule; and the reason is, that the receipt of the rent is considered as an acknowledgment of a subsisting tenancy. But it does not follow that the new term must necessarily be a year. Where the former lease was for less than a year, as a quarter or a month, or where the term, though extending to a year or more, was composed of such periods, there is no ground for holding that the new term, presumed from the holding over of the tenant and the receipt of rent by the landlord, extends beyond one of the periods of the tenancy. The tenant who enters under a lease for a month, and holds over, and during the second month pays rent, is not entitled to claim a new term of one year, but he becomes a tenant from month to month. When the tenancy is found from the fact of the holding over of the tenant and the acknowledgment of the landlord, it is presumed to be of the same character—as annual, quarterly, monthly, &c., and upon the same covenants and conditions as in the previous tenancy. It rests upon implication alone. But if the parties make an express agreement relating in any respect to the new tenancy, then in that respect there is no room for implication." This case also holds that a receipt specifying the tenure amounts in law to a lease.

Certain leases to be in writing.

A lease for a year or less need not be in writing, but if it be for a longer term than one year, it must be

in writing, subscribed by the party making the same, or by his lawful agent thereunto authorized by writing (*Post v. Martens*, 2 *Robt.* 437 ; *Porter v. Bleiler*, 17 *Barb.* 149). The statute provides that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over and concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing" (2 *Edm. R. S.* p. 139, § 6).

"Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made" (*Id.* § 8).

"Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party lawfully authorized" (*Id.* § 9).

"And leases for years, although chattels real, are no longer deemed terms as at common law, but estates" (*Averill v. Taylor*, 8 *N. Y.* 44).

Validity of certain leases. Future term.

A parol lease of land, for one year, to commence *in futuro* is not within the statute, and is valid ; the year in the statute refers only to the term (*Taggard v. Roosevelt*, 2 *E. D. Smith*, 100 ; *S. C.* 8 *How. Pr.* 141 ; *Young v. Dake*, 5 *N. Y.* 463 ; overruling 7 *Barb.* 191) ; and a parol agreement to give a lease for a term exceeding one year is void (*Anderson v. Prindle*, 23 *Wend.* 616 ; aff'd 19 *Id.* 391 ; *Dung v. Parker*, 52 *N. Y.* 494).

Covenants.

An express covenant will control an implied one, for the maxim of the law is "*expressum facit cessare tacitum.*"

Right to renewal of lease.

The right of renewal constitutes a part of the tenant's interest in the land ; and the grant of the additional term is for many purposes considered as a continuation of the former lease (*Winslow v. Tighe*, 2 *Ball & Beat.* 195, 205 ; *Rawe v. Chichester*, 2 *Amb.* 715, 719 ; S. C. 1 *Bro. C. C.* 198, *n.* ; S. C. *nom.* ; *Bromfield v. Chichester*, and *Raw v. Duthelly*, 2 *Dick.* 480 ; *Randall v. Russell*, 3 *Meriv.* 197). A landlord is not bound to renew the lease without an express covenant to do it. And covenants for a continual renewal are not favored, for they tend to create a perpetuity, and have been said to be equivalent to an alienation of the inheritance. Covenants of renewal run with the land, and bind a grantee of the reversion. A covenant to renew implies the same term and rent, and perhaps the same condition, excepting that a covenant to renew a lease under the same conditions contained in the original lease is satisfied by a renewal of the lease omitting the covenant to renew (*Carr v. Ellison*, 20 *Wend.* 178 ; *Tritton v. Foote*, 2 *Bro. C. C.* 636 ; 2 *Cox*, 174 ; *Iggulden v. May*, 7 *East*, 237 ; *Hide v. Skinner*, 2 *P. Wins.* 197) ; continuing in possession amounts to an election to renew (*Kelso v. Kelly*, 1 *Daly*, 419) ; and as to what amounts to waiver of a condition requiring notice, see *Viany v. Ferrar*, 5 *Abb. N. S.* 110 ; and see 2 *Daly*, 213 ; and as to arbitrations as to terms of renewal, see 5 *Abb. Pr. N. S.* 110 ; 1 *Daly*, 39 ; 7 *Robt.* 468. A covenant in a lease that the lessee shall have "the refusal of the premises at the expiration of the lease" for a specified term, is a covenant to renew the lease at the same rent for such term.

It is violated by the lessor if he refuse to give a new lease except at an increased rent, and the acceptance by the lessee of a new lease at the increased rent, after such violation, he at the time protesting against the right to exact the increased rent, and claiming to reserve the right of action for the breach of covenant, is not a waiver of the covenant. The lessee in such a lease is not compelled to wait until the actual termination of the lease before he makes his election to have the lease renewed. The lessor is bound to renew when the lessee makes his election and demands his renewal. Where the covenant is an independent one, the fact that the lessee was liable to the lessor for rent upon another covenant contained in the lease does not excuse its performance (*Tracy v. Albany Exchange Co.* 7 *N. Y.* 472). Where the instrument is silent as to the party who is to exercise the right to determine, the lessee only has the option of determining the lease at the specified time, on the principle that where the words of a grant are doubtful, they must be construed more strongly in favor of the grantee (*Dann v. Spurrier*, 3 *B. & P.* 399; *Price v. Dyer*, 17 *Ves.* 356; *Doe v. Dixon*, 9 *East*, 15; *Goodright v. Richardson*, 3 *T. R.* 462). A executed to B a lease of certain premises for one year, containing a clause in these words: "B to have the privilege to have the premises for one year, one month and twenty days longer, but if he leaves he is to give four months' notice, before the expiration of the lease," and it was held, that the lease created a term for the full period of two years, one month and twenty days, defeasible at the election of the tenant, after one year, by giving notice of his intention to leave the premises four months previous to the expiration of the year (*Chretien v. Doney et al.*, 1 *N. Y.* 419).

A lease was executed for a term commencing the first day of July, 1853, and ending the first day of July, 1855, "with the privilege of two years more if desired," one month before the expiration of the period specified,

at a certain yearly rent, to be paid monthly during the term, with a clause expressing that the lessees had hired and taken the premises, "for the term and at the rent aforesaid," and that they agreed to pay the rent, and it was held, that it was not contemplated by the parties that in case the lessees should desire the premises for the additional two years, a new lease should be made, embracing the further time; but that it was intended the present lease, on notice being given, should cover the whole period; and that the agreement to pay rent was co-extensive with the entire term of the lease, not only as it was originally fixed, but as it should be extended according to the provisions of the lease (*House v. Burr*, 24 *Barb.* 525); and equity will relieve a lessee who fails to comply with a condition respecting notice in a covenant for the renewal of his lease, and compel specific performance thereof, where it appears that he has given a fair intimation of his intention to renew, and no injury has been done to the other party; but not where there have been gross laches, or where the neglect was wilful (*Reed v. St. John*, 2 *Daly*, 213).

Power of agent.

A lease signed as agent of the lessor, by a person not having authority in writing, so as to sign, can not create the estate purported to be created in it, and is rendered void by statute (*Post v. Martens*, 2 *Robt.* 437; *Porter v. Bleiler*, 17 *Barb.* 149); although an agent must have written authority to make a valid lease for more than one year, an agent to sell real estate may contract in writing, without written authority, the language of the statute being differently construed in the two cases (*Worrell v. Munn*, 5 *N. Y.* 229; 8 *N. Y.* 160; 1 *Parsons on Contracts*, 4th ed. p. 47); and as to ratification, see *Commercial Bank v. Warren* (15 *N. Y.* 577); and an agent to rent premises and collect rents has no power to consent to the substitution of a new tenant

(*Wilson v. Lester*, 64 *Barb.* 431), and a sealed agreement or lease, signed by an agent in his own name, describing himself as "agent" of the owner of the premises, does not bind the owner. A special agreement under seal, executed by an agent, must appear on its face to be the contract of the principal, or the principal will not be bound (*Dean v. Roesler*, 1 *Hilt.* 420).

Rights of lodgers.

Lodgers are entitled to all the privileges of tenants, and enjoy the same protection as to payment of rent and of notice to quit, terminable according to the terms of the letting. If a man takes lodgings on the first or second floor of a house, he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and the water-closet, unless it is otherwise stipulated at the time of taking lodgings; and if the landlord deprives him of the use of any, an action lies (§ 67 *Taylor's L. & T.* 5th ed. citing *Underhill v. Burrows*, 7 *C. & P.* 26), and the doctrine of *caveat emptor* has no application to a demise of ready furnished lodgings (*Smith v. Manable*, 1 *Carr & Marshm.* 479).

Effect of occupation under void lease.

Occupation under a lease void as to the term, is valid in other respects and inures as a yearly tenancy (*Schuyler v. Leggett*, 2 *Cow.* 660; *People v. Rickert*, 8 *Id.* 226; 5 *T. R.* 471; 8 *Id.* 3; 31 *N. Y.* 514; 33 *Id.* 245); but as to a tenant paying a monthly rental, it inures as a hiring from month to month (*Anderson v. Prindle*, 23 *Wend.* 616; *aff'g* 19 *Id.* 391; *The People v. Darling*, 47 *N. Y.* 666); and if the premises are situated in the city of New York, and the parol lease is void as to the term, the statute treats it as a tenancy for no specified time, and designates its termination to be on the first of May following (*Taggard v. Roosevelt*, 2 *E. D. S.* at p. 105); and although a lease be void for want of written authority in the agent to execute it, it may still be referred to, to regulate and ascertain the rights of the parties during the actual existence of the tenancy (*Porter v. Bleiler*, 17 *Barb.* 149).

Legal meaning of certain terms.

LAND.—The term land comprehends any ground, soil, or earth whatsoever, which is not separated from the earth, as meadows, pas-

tures, woods, waters, marshes, furze, and heath. It has an indefinite extent upward and downward; no man can therefore build so as to overhang his house on his neighbor's ground. The buildings which are erected upon land are a part of it, for whatever is built upon the soil, is an accessory to the soil. Hence, if a man grant or devise the land without mentioning the buildings, the latter will pass (2 *Bouvier Inst.* pp. 156, 157).

MORE OR LESS.—These words are used as matter of general description, and as intending to cover a small difference one way or the other in the quantity of the premises demised.

REAL PROPERTY, in the technical phraseology of the law, consists of lands, tenements, and hereditaments (*Hilliard on Real Property*, vol. 1, p. 1).

TENEMENT.—The word tenement in its most extensive signification comprehends everything which may be holden, provided it be of a permanent nature. In its most confined and vulgar acception, it means a house or building (2 *Bouv. Inst.* p. 167); but it is also used in a much more enlarged sense, as signifying land, or any corporeal inheritance, or anything of a permanent nature, which may be holden. And where it was used in a statute, providing a summary remedy for landlords to recover possession, it was held that as the act was a remedial one, the largest sense of the word should be adopted (*Sackett v. Wheaton*, 17 *Pick.* 105).

HEREDITAMENTS.—The term hereditaments includes lands and tenements (1 *Hilliard on Real Property*, p. 1).

MESSUAGE OR HOUSE.—These are synonymous terms (2 *T. R.* 502).

APPURTENANCES.—This word will pass only things which have been used together with the house or land demised, or which are reputed or accepted as part thereof (*Fawcett's L. & T.* p. 75), and is introduced into leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises.

What is included in the term house.

Messuage or house, may comprehend besides the house and buildings adjoining, a court yard, garden, and orchard belonging to the same, and the stable and other outhouses necessary for the convenient occupation of the house (*Fawcett's L. & T.* p. 75, and cases cited), and a conveyance in general words of a house, passes everything that belongs to the house with it; and whether a thing is parcel or not of the thing demised, is always matter of evidence. Accordingly where the plaintiff, by a sealed lease, rented to defendant two houses, describing them as "Nos. 162 and 164 Seventh avenue," it was held that parol evidence was admissible to show that a certain rear yard or lot passed with the demise of the two houses, and that as a general rule parol evidence is always admissible to ascertain the nature and qualities of the subject to which an instrument refers (*Cary v. Thompson*, 1 *Daly*, 35).

LEASE.—A lease is a contract for the possession and profits of land and tenements on the one side, and a recompense of rent or other income on the other, and there may be a lease without any reservation of rent (*Failing v. Schenck*, 3 *Hill*, 344; *Hunt v. Comstock*, 15 *Wend.* 667).

RENT is a periodical return made by any particular tenant of land, either in money or otherwise, in retribution for the land. A rent

must be certain, or capable of being made so by either party (1 *Hilliard on Real Property*, 227).

Rent is defined to be a certain profit, issuing yearly out of lands and tenements corporeal (*Co. Litt.*, 141 *g*; 2 *Bl. Com.*, 41), and was defined by Lord Chief Baron Gilbert to be an annual return made by the tenant, either in labor, money, or provisions, in retribution for the land that passes (*Gilb. Rents*, 9; *note to Co. Litt. by Thomas*, vol. 1, 508). The general understanding of the term rent, is the payment of a specified amount of money on a day named in the lease, for the use and occupation of the demised premises. Instances where the compensation or return is made in goods or by rendition of services are certainly exceptional.

Recording leases.

The statute declares, that "every conveyance of real estate, within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded" (1 *Edm. R. S.*, p. 707, § 1).

Term "real estate" defined.

The term "real estate," as used in this chapter, shall be construed as co-extensive in meaning with "lands, tenements, and hereditaments," and as embracing all chattels real, *except leases for a term not exceeding three years* (*Id.*, p. 714, § 36).

Certain counties not affected.

"The provisions of this chapter shall not extend to leases for life or lives, or for years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware, and Schenectady" (*Id.*, p. 715, § 42).

Register in New York.

All the provisions of this chapter, excepting the eighteenth section, conferring any powers, or imposing

any duties, obligations, or penalty upon a county clerk, shall extend and apply to the Register of the city and county of New York, in the same manner as if he were county clerk of the said county (*Id.*, p. 715, § 43).

The statute embraces all leases for a term exceeding three years (35 *Barb.* 334; 16 *N. Y.* 712), and leases improperly recorded are not available as notice (*James v. Morey*, 2 *Cow.* 246; *Frost v. Beekman*, 1 *Johns. Ch.* 300; *Cook v. Travis*, 22 *Barb.* 338; *Gillig v. Maas*, 28 *N. Y.* 191; 13 *Geo.* 443; 37 *Maine*, 423; 11 *Grat.* 321).

Effect of possession as notice.

The general rule is, that possession of land is constructive notice to a purchaser, mortgagee, or others, of the occupant's title and equities; the purchaser is chargeable with notice of the extent of their interest as tenants. Possession, however, to operate as constructive notice, must be by occupation, or by open and visible improvements, in distinction from mere fencing or such like (see *Williamson v. Brown*, 15 *N. Y.* 354; *Grimstone v. Carter*, 3 *Paige*, 421; *Trustees v. Wheeler*, 5 *Lansing*, 160; 5 *Barb.* 51; 10 *Id.* 97, 254, 454; 22 *Id.* 338; 20 *N. Y.* 400; 5 *Johns. Ch.* 29; 6 *Wend.* 213, 226; 6 *Cush.* 170; 43 *Maine*, 519; 21 *How. U. S.* 423).

CHAPTER V.

VALIDITY OF LEASE AS AFFECTED BY FRAUD.

Leases, like other contracts, may be rescinded and relieved against upon the ground of fraud as to or in any matter material to the subject of the demise. The maxim of *caveat emptor* applies, however, to the leasing as well as to the transfer of real or personal property, and the lessee or purchaser generally takes the risk of its quality and condition, unless he protects himself on the subject by express agreement (*Cleves v. Willoughby*, 7 *Hill*, 83; *Meeks v. Bowerman*, 1 *Daly*, 100); in other words, he takes the premises for better or for worse (*Bloomer v. Merrill*, 1 *Daly*, 486; *Mumford v. Brown*, 6 *Cow.* 476). The extent to which this rule applies to demises is well illustrated by the cases. In *Meeks v. Bowerman* (1 *Daly* 99, *supra*), it was held that upon a demise the landlord is not bound to disclose to the lessee the uses to which the demised premises have been previously put, and in the absence of any express covenants in the lease, that there could be none implied by which the lessor could be held as warranting the premises fit for the purposes for which they were rented, and that the mere suppression by the landlord of the fact that the house had been previously occupied as a brothel, constituted no defense.

In a somewhat similar case in the superior court (*Staples v. Anderson*, 3 *Robt.* 327), it was held that "the question of fact as to the character of the house at the time of the letting being known to the plaintiff, and his false representation or fraudulent concealment thereof from the defendant, ought to be submitted to the jury," and that a direction to find for the landlord

upon the theory that there was no defense was ground for granting a new trial.

In another case (*Cornfort v. Fawke*, 6 *Mees. & W.* at p. 373), it was held that "it must also be admitted that if the plaintiff knew of the nuisance (a brothel next door), but purposely employed an agent, suspecting that a question would be asked from him, and at the same time believing and suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would undoubtedly be guilty of a fraud, and the contract would be avoided; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsity, would doubtless be a fraud." The further question as to how far the existence of such nuisances amount to an eviction of the tenant, will be considered in a subsequent chapter, under the title of Eviction.

In *Hart v. Windsor* (12 *M. & W.* 68; 13 *L. J. Ex.* 129), it was held that there is no contract implied by law on the part of the lessor of an unfurnished house, that it is in a reasonably fit state for occupation, although it is let for the purpose of immediate habitation.

In *Keates v. Cadogan* (10 *Com. B.* 591; 20 *L. J. C. P.* 76), it was held that the owner of a house is not bound to disclose to an intended lessee that it is in a ruinous state, and dangerous to occupy. In the case first cited, the court say: "It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any

man in his senses would do, viz., make proper investigation and satisfy himself as to the condition of the house, before he entered upon the occupation of it. There is nothing amounting to deceit; it is a mere ordinary transaction of letting and hiring" (see also 12 *M. & W.* at p. 87).

It is said that no legal demand can arise out of a contract based upon an illegal or immoral consideration, and that rent or damages for breaches of covenant are not recoverable under leases of houses used for purposes of prostitution, provided the lessor is aware the premises are so used (*Girardy v. Richardson*, 1 *Esp.* 13; *Crisp v. Churchill*, 1 *B. & P.* 340; *Jennings v. Throgmorton*, *Ry. & M.* 251; *Appleton v. Campbell*, 2 *C. & P.* 347; see also *Smith v. White*, 35 *L. J. Ch.* 464; *L. R.* 1 *Eq.* 626). In an action for breach of a contract to let premises, the defendant may justify such breach by proving that the plaintiff intended to use the premises for an illegal purpose, although at the time of refusing to perform the contract he did not assign or act upon such intended use, as a reason for his refusal (*Cowan v. Milbourn*, 36 *L. J. Ex.* 124; *L. R.* 2 *Ex.* 230; 15 *W. R.* 750; 16 *L. T. N. S.* 290); the New York Common Pleas, however in *O'Brien v. Brietenbank* (1 *Hill.* 304), decided otherwise. That court held that in an action by a lessee for damages for refusing to give possession of the premises, it was no defense that the defendant hired the premises intending to keep a bawdy house therein, and that the mere avowal by the lessee of an intent to employ the leased property in an unlawful business did not constitute an offense, nor did it entitle the lessor to repudiate his contract.

In *Feret v. Hill* (15 *C. B.* 207; 2 *C. L. R.* 1366; 18 *Jur.* 1014; 23 *L. J. C.P.* 186) it was held that after the lessee has entered into possession under a lease, the lessor can not avoid such lease, on the ground that it was obtained by the fraudulent misrepresentations of the lessee as to matters collateral to the lease; as, for

instance, that he intended to use the demised premises for a respectable business, whereas he used them for an immoral purpose.

In the *Gas Light Co. v. Turner* (6 *Bing. N. C.* 324), it was held that rent reserved upon a lease of premises, used for the purpose of boiling oil and tar, contrary to the provisions of the building act, could not be recovered.

In *Giraldy v. Richardson* (1 *Esp.* 13), which was an action of assumpsit for use and occupation of certain rooms belonging to the plaintiff, the defendant proved that she was a woman of the town; that the rooms had been let to her by the wife of the plaintiff, who, it was proved, managed the business of his house in letting his lodgings; that at the time of letting them, she was informed of the defendant's mode of life, and consented that she should be at liberty to receive male visitors for the purpose of prostitution; and Lord KENYON ruled that, under these circumstances, the action was not maintainable; that the contract upon which it was attempted to be sustained was *contra bonos mores*, and therefore could not support an action, and his lordship therefore directed a verdict for the defendant; and the same rule governs in cases of contracts for clothes, or board and lodging, the price of which is to be paid out of the profits of prostitution. But the mere fact that the person to whom board and lodging or any articles are furnished, is a prostitute, does not invalidate the contract therefor, unless the very object of the agreement be to pander to her prostitution (*Story on Cont.* § 542, and authorities cited).

Appleton v. Campbell (2 *Car. & P.* 347), was an action of assumpsit for board and lodging. The defense was, that the defendant was an immodest woman, and used the lodging for the purposes of prostitution, to the knowledge of the plaintiff. To substantiate this, another female, who lodged in the house, and who was

called for the plaintiff, proved on her cross-examination, that the defendant was in the habit of receiving male visitors ; and that the plaintiff used sometimes to open the door for them ; and that the plaintiff told her, that the defendant was an immodest woman, and ABBOTT, C. J., said, "If a person lets lodging to a woman to enable her to consort with the other sex, and for the purposes of prostitution, he can not recover for the lodging so supplied. But if the defendant had her lodgings there, and received her visitors elsewhere, the plaintiff may recover, although she be a woman of the town, because persons of that description must have a place to lay their heads ; but if this place was used for immoral purposes, the plaintiff can not recover." The jury found for the defendant.

Jennings v. Throgmorton (1 *Ryan & Moody*, 251), was an action of assumpsit for use and occupation of certain rooms belonging to the plaintiff. The defense set up was, that the rooms were let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact. It did not appear from the evidence produced in support of the defense, that the plaintiff, at the time of letting the rooms to the defendant, was aware of her mode of life ; but it was proved that after the defendant had occupied the rooms for about two months the plaintiff was fully informed of the defendant's receiving male visitors there, and that she supported herself by prostitution. It was also shown that the defendant was a *weekly* tenant, and ABBOTT, Ld. C. J., said : "There are two questions for your consideration: *First*. You are to consider whether the plaintiff originally let these lodgings to the defendant for the purposes of prostitution ; and if you should be of opinion that he did, then your verdict should be for the defendant: *Secondly*. If you should be of opinion that the plaintiff was not originally aware of the defendant's course of life, and the purpose to which these lodgings were to be applied,

you are to consider whether he allowed her to remain as his *weekly* tenant, after he had become acquainted with her mode of life. I am of opinion, that if the plaintiff, after he became acquainted with her mode of living, suffered her to occupy the premises for the express purpose of continuing a life of prostitution, and the present demand accrued after he had acquired this knowledge of her character, that he is not entitled to recover, and that your verdict should be for the defendant." The jury found a verdict for the defendant.

In *Bowry v. Bennet* (1 *Camp.* 348), where an action was brought to recover for clothes sold to a prostitute, and the defense was that the articles were sold for the purpose of enabling her to carry on her business of prostitution, Lord ELLENBOROUGH said it must not only be shown that the plaintiff had notice of the defendant's way of life, but that he sold the goods to enable her to carry it on (see also *Gray v. Mattheas*, 5 *Ves. Jr.* 291). In *Trovinger v. McBurney* (5 *Cow.* 253), which was for the board of a female who had been living with the defendant, and had by him an illegitimate child, and the defense was that the contract was made with a view of facilitating the continuance of the state of prostitution between the defendant and the female boarder, the court said, "The simple circumstance that the plaintiff had knowledge of the previous cohabitations did not furnish legal ground for an intent to sanction their repetition; something more was necessary."

These authorities are referred to as establishing the doctrine that in order to avoid a contract of leasing upon the ground of the illegal nature of the occupation of the premises, the landlord must be connected with the illegal act complained of, by previous knowledge or notice, so that the illegal nature of the occupation enters into and actually forms part of the contract, by necessary implication, for, as the court held in *Gibson v. Pearsall* (1 *E. D. Smith*, 90), a lease is not

void under the laws prohibiting gaming, unless the lessor at the time of making the agreement was a party to the illegal act, and let the premises in furtherance thereof.

In *Updike v. Campbell* (4 *E. D. S.* 570), it was held that a contract letting premises for the very purpose of conducting a bowling alley is void, but that letting premises with knowledge of facts from which the lessor may reasonably suppose an intention on the part of the lessee to keep a bowling alley, followed by the actual use of the premises for that purpose within the observation of the lessor, is not of itself sufficient, unless the lessor is clearly proved a direct party to the to the illegal intent, and performs some act plainly in aid and furtherance thereof.

In *Jackson v. Walker* (5 *Hill*, 27), which was an agreement to pay money to keep open the log cabin on Broadway, contrary to the law relative to elections, it was made a part of the agreement that the building should be used for the prosecution of the success of a political party, and it was held to be void for that reason, as a violation of the election laws, and the judgment was afterwards affirmed (7 *Hill*, 387).

In *Kneiss v. Seligman* (5 *How. Pr.* 425), it was decided that it does not affect the legality of the sale of goods, that the vendor knew that they were to be used by the purchaser for an unlawful purpose, unless the vendor does some act beyond the mere sale, in aid or furtherance of the unlawful object, and that bare knowledge on the part of the vendor that the vendee intends to put the goods to an illegal use, which intention may or may not be followed up, will not vitiate the sale nor deprive the vendor of his remedy for the purchase money.

In *Smith v. White* (1 *L. R. Eq.* 626; 35 *L. J. Chanc.* 454; 14 *W. R.* 510; 14 *L. T. N. S.* 350; 2 *C. R.*), where a lessee of a house which to his knowledge had for

many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose, and where the original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify the lessee from the covenants in the lease, and the lessee having been compelled to pay for dilapidation at the end of the lease, sought to recover the amount from the estate of the assignor, which was being administered in equity, and it was held that the assignment, and everything arising out of it, were so tainted with the immoral purpose that the lessee could not recover.

In *Holmead v. Maddox* (*Circ. Ct. D. C.*, 2 *Cranch C. Ct.* 161), it was held that the owner of a race-field, who knowingly let it for the purpose of public races and for booths and stands for the accommodation of licentious and disorderly persons for the purpose of unlawful gaming, and of gross immorality and debauchery, to the corruption of good morals and manners, could not recover the rent in an action of covenant.

In *Rosenbaum v. Gunter* (3 *E. D. S.*, 203), it was decided that a fraudulent representation, by the lessee of a house, as to the amount paid by him under his lease, will not avoid a contract made by him for hiring to a third person a part of the premises, at a specified rent, it being within the power of the latter to ascertain the value by a personal examination. The rule as applicable to vendor and vendee of real estate is otherwise; and if the vendor misrepresent the rental of the property, it is ground for refusing to perform the contract (*Phillips v. Conklin*, 2 *T. & C. Sup. Ct. Rep.* 619; 58 *N. Y.* 682).

In *Ellis v. Andrews* (56 *N. Y.* 83), the Court of Appeals decided that a false statement, as to the value of property, made by a vendor for the purpose of obtain-

ing a higher price than he knows the property is worth, will not sustain an action of fraud by the purchaser who contracted relying upon the statement, and that the purchaser in such a case must rely upon his own judgment as to value; although an action on the case may be maintained by the purchaser of lands against the seller for fraudulently misrepresenting the boundaries of the lands (*Clark v. Baird*, 9 *N. Y.* 183); and where one conveys to another his right in real estate, an action will lie for a fraudulent representation as to the territorial extent of such right (*Whitney v. Allaire*, 1 *N. Y.* 305).

In the famous case of *Laidlaw v. Organ* (2 *Wheaton*, 178) Chief Justice MARSHALL said: "The question in this case is, whether the intelligence of extraneous circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. *The Court is of opinion that he was not bound to communicate it.* It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other."

The *suppressio veri* is not therefore necessarily a ground of fraud, although the *suggestio falsi* is, as a rule; for the concealment or non-disclosure of facts, to amount to a fraud, must be of those facts and circumstances which one party is under some legal or moral obligation to communicate to the other, and which the other has a right to know, not merely *in foro conscientie*, but *juris et de jure* (*Van Arsdale v. Howard*, 5 *Ala. N. S.* 596; *s. p.* *Barnett v. Stanton*, 2 *Ala. N. S.* 181; *Truebody v. Jacobson*, 2 *Cal.* 269; *Aorston v. Ridgway*, 18 *Ill.* 23; *Jenkins v. Simpson*, 14 *Me.* 364; *Young v. Bumpass*, 1 *Freem. [Miss.] Ch.* 241; *McAdams v. Cates*, 24 *Mo.* 223; *Trigg v. Read*, 5 *Humph.*

529 ; *Ingram v. Morgan*, 4 *Id.* 66 ; *Dickinson v. Davis*, 2 *Leigh*. 401) ; unless, perhaps, in a case where one party artfully conceals from another material facts within his knowledge, of which he knows the other party has neither knowledge nor the necessary means of information (*Prentiss v. Russ*, 16 *Me.* 30 ; *Durell v. Haley*, 1 *Paige*, 492).

In *Wallace v. Lent* (1 *Daly*, 481), it appeared “that a landlord rented a dwelling-house to a tenant without disclosing the fact, of which he was aware, that there was a deleterious stench in the house, proceeding from some unknown cause, which rendered it unfit for habitation. The tenant, ignorant of the circumstances, went into possession with his family, and in a very short time all the inmates of the house experienced the injurious stench, producing vomiting, &c., and it was held that the concealment was a fraud on the part of the landlord, and that the tenant was justified in leaving.”

In *Westlake v. Degraw* (25 *Wend.* 672), the question presented was whether the tenant was justified in putting an end to the lease under which he held, on account of certain noxious smells, set up as a defense, and the Supreme Court (per NELSON, C. J.) said: “It must be assumed, that no fraud was practiced upon the tenant by the landlord, as that has been negatived by the verdict of the jury. It appears, also, that the alleged nuisance existed at and before the defendant made the contract and entered into the possession ; and that it arose from the carcasses of dead rats under the steps of the house. The discovery was made by the succeeding tenants ; and it seems to me that ordinary vigilance on the part of the defendant would have enabled him to have done the same. He not only appears to have been remiss in this respect himself, but even refused to allow a mechanic, sent by the plaintiff, to take the necessary steps to detect and remove the cause of the nuisance. It was readily removable when dis-

covered, and in its own nature was of but temporary duration. It is an inconvenience to which all buildings are more or less subject at times; but which, with ordinary skill and attention, may be abated by the tenant. It would, I apprehend, be the introduction of a new principle into the law of landlord and tenant, and one liable to great abuse, to give countenance to this defense." Judgment for plaintiff affirmed.

Remedy in case of fraud.

The sweeping assertion frequently made, that fraud vitiates every contract, must be limited somewhat in its application, for the innocent party may waive the fraud and insist upon the contract, while the fraudulent party can not assert his fraud, and claim as his right any advantages resulting from it. The defrauded party has also a choice of remedies; he may rescind the contract for the fraud, or may, as in case of warranty, retain the property and recover the damages suffered in consequence of the misrepresentations (1 *N. Y.* 305). If he desires to rescind, he must offer so to do within a reasonable time after the discovery of the fraud (*Rosenbaum v. Gunter*, 3 *E. D. S.* 203; *Wallace v. Lent*, 1 *Daly*, 481; 46 *Barb.* 467; 2 *Par. on Con.* 4th ed. 277; *Kerr on Frauds*, 299), and in order to rescind the contract, he must restore the other party as nearly as possible to the same condition that he would have been in, if the contract had not been made (*Minturn v. Mann*, 7 *N. Y.* 220; *Mason v. Bovet*, 1 *Den.* 69; *Nichols v. Pinner*, 18 *N. Y.* at p. 312; *Nichols v. Michael*, 23 *Id.* at p. 272; *Sweetman v. Prince*, 26 *Id.* at p. 227; *Cobb v. Hatfield*, 46 *Id.* 533), and in order to rescind the contract, it is supposed that the tenant ought to offer back the lease, with any writing necessary to reinvest the title in the lessor (*Central Bank v. Pindar*, 46 *Barb.* 467; *Quincy v. Tilton*, 7 *Greenl.* at p. 279), and ought to surrender the keys which, in a symbolical

sense, is regarded as the possession itself (*Little v. Martin*, 3 *Wend.* 219; *Hall v. Western Trans. Co.*, 34 *N. Y.* 284; see also 5 *John.* 335; 2 *Pick.* 206; *Ross on Vendors* (1st Ed.), 11, 55; 11 *Cush.* 282; 55 *Penn.* 393).

Election to affirm.

Where a party discovers the misrepresentation of another before proceeding with a contract he must, if he can, elect whether he will waive the fraud and proceed with the contract, or whether he will on account of the fraud throw it up, and the election when made is conclusive; for example, in a case where A. engaged to carry away certain rubbish for B. at a *specified sum*, found upon commencing his work that B. had made fraudulent representations as to the quantity of rubbish, but nevertheless went on with the work, and then sought to recover more than the sum specified by the contract, and it was held that by going on with the work he had waived the fraud, and could not recover except upon the special contract (*Selway v. Fogg*, 5 *M. & W.* 83), and the case of *Saratoga R. R. Co. v. Row* (24 *Wend.* 74), is somewhat similar. In that case a contract was made for work to be done at a stipulated price, and it was discovered before the work was commenced, that a misrepresentation had been made in respect to its value, and the court held that on that account, the party engaging to do the work might repudiate the contract, but that if he did not do so, but went on and performed it, he could demand no more than the contract price.

Effect of lessee taking possession.

In *Whitney v. Allaire* (1 *N. Y.* 305), it was held that where one conveys or leases to another his right in real estate, an action will lie for a fraudulent representation as to the territorial extent of such right, and

that the lessee, by taking possession at the commencement of the term, and after having discovered the fraud, waives thereby only his right to rescind the contract, but not his right to recover the damages occasioned by the fraud.

The rule seems to be that where a party has been defrauded in the purchase or sale of real property, he may rescind the contract, so as to restore the parties to the same situation they were in when the contract was made, or he may affirm it, so far as it has been executed, and claim a compensation for the fraud (*White v. Seaver*, 25 *Barb.* 235). If he has received a conveyance, he must reconvey, or offer to reconvey, or he can not rescind (*Bradley v. Bosley*, 1 *Barb. Ch. Rep.* 125; *Moyer v. Shemaker*, 5 *Barb.* 319), and the same is true as to personal property (4 *Denio*, 51-54; 2 *Hill*, 288-294; 5 *Id.* 389; 3 *Sandf.* 174; 14 *Barb.* 594).

CHAPTER VI.

RIGHTS OF LANDLORD.

- I. Time of payment of rent.
- II. Mode of payment.
- III. Tender of payment.
- IV. Application of payments.

I.

Time of payment of rent.

The time when rent is to be paid, is to be determined from the words of the *reddendum* if the lease be in writing, or from the oral evidence of the terms of hiring, if there be no writing, and if prior rent has been paid under the agreement, that circumstance together with the manner and time of payment, may by necessary implication aid in arriving at the correct understanding of the parties as to the manner and time of payment, where the same were not otherwise intelligently expressed.

In the city of New York, however, the statute in the absence of any different agreement between the parties provides that rent shall be payable at the usual quarter days for the payment of rent in said city (1 *Edm. R. S.* 695, § 1 ; *Wolf v. Merritt*, 21 *Wend.* 336) ; and a provision in a lease making the rent payable *in advance*, is valid and enforceable (*Giles v. Comstock*, 4 *N. Y.* 270 ; 1 *Den.* 113 ; 4 *Cow.* 576).

II.

Mode of payment.

The landlord is entitled to his rent in lawful money of the United States, but if the landlord accepts a check,

note, or bill for the rent, it will be a good payment in law, provided the check, note, or bill be paid on presentation or maturity, but as a rule, however, a mere promise to pay is no payment until performed, and the taking of the tenant's check, note, or bill is not payment until the obligation taken is paid (*Peters v. Newkirk*, 6 *Cow.* 103; *Bradford v. Fox*, 38 *N. Y.* 289; *Smith v. Miller*, 43 *Id.* 171; *Snyder v. Kunkleman*, 3 *Penn.* 487; *Vanstéénburgh v. Hoffman*, 15 *Barb.* 28; *Cornell v. Lamb*, 20 *Johns.* 407; *Price v. Limehouse*, 4 *McCord*, 544; *Printems v. Helfried*, 1 *Nott. & McC.* 187; *Bailey v. Wright*, 3 *McCord*, 484), and rent is not extinguished by taking a note and chattel mortgage to secure it (*Lofsky v. Maujer*, 3 *Sandf. Ch.* 69); and see *Toby v. Barber*, 5 *Johns.* 68; *Muldoon v. Whitlock*, 1 *Cow.* 290). Indeed, nothing is considered as an actual payment which is not in truth such, unless there be an express agreement based on a good consideration that something short of a payment shall be taken in lieu of it (*Olcott v. Rathbone*, 5 *Wend.* 490); and it has been held that taking the debtor's note will not even suspend the right of distress until it becomes due (*Davis v. Gyde*, 4 *Nev. & M.* 462; *Bailey v. Wright*, 3 *McCord*, 484); but the supreme court of Maine have recently decided, that the taking of a promissory note for an antecedent debt imposes upon the creditor an obligation to wait for his pay till the note matures, without any special agreement to that effect (*Thompson v. Gray*, 63 *Maine*, 228, and see 9 *Cow.* §194; 2 *Barn. & Ald.* 496; 2 *Whart.* 253); when the debtor gives his own note it is not payment, though receipted as such (*Muldoon v. Whitlock*, 1 *Cow.* 290; 9 *Johns.* 310), but the note must be surrendered at or before the trial upon the original cause of action (*Cow. Tr.* § 464; 4 *Barb.* 369; 6 *Id.* 432; 8 *Id.* 408; 3 *Cow.* 147; 8 *Id.* 77; 8 *Johns.* 149; 15 *Id.* 247; 23 *Wend.* 345; 4 *Watts*, 452; 3 *Cranch.* 311; 2 *Gilman*, 701-713); where the draft of a third person is received by a

creditor as conditional payment of a debt due him, his right of action upon the debt is suspended until the draft is properly presented for payment, and payment refused; by receiving such draft, the creditor accepts the duty of doing everything with respect thereto which is necessary to fix the liability of the parties; and the *onus* is upon him to show that he has performed that duty when he seeks to recover upon the original cause of action (*Phoenix Ins. Co. v. Allen, Redfield & Bigelow, Leading Cases upon Bills and Notes*, p. 637, and 11 *Mich.* 501). In the absence of such neglect of duty upon the part of the creditor, the effect of receiving payment of a precedent debt in the notes of a third person afterwards dishonored, was considered by the New York marine court, June term, 1875, in *Wehrlin et al. v. Schmutz, et al.*, reported in the *New York Daily Register*, July 24, 1875, as follows:

MCADAM, J.—The determination of this action depends upon the effect to be given to the alleged payment of the precedent debt of the defendant in the notes of a third party, afterwards dishonored.

The rule deducible from the authorities seems to be, that taking a note from one of several joint debtors, or taking from the debtor the note of a third person for a pre-existing debt, is no payment, unless it be expressly agreed to be taken as payment, and unless the creditor agrees to assume the risk of the maker's solvency (*Tobey v. Barbee*, 5 *Johns.* 68; *Johnson v. Weed*, 9 *Johnson*, 310; *Muldoon v. Whitlock*, 1 *Cow.* 290; *Van Eps v. Dillaye*, 6 *Barb.* 244; *Vail v. Foster*, 4 *N. Y.* 312; *Noel v. Murray*, 13 *Id.* 167; *Benedict v. Field*, 16 *Id.* 595; *Bates v. Rosekrans*, 37 *Id.* 409; *Roberts v. Fisher*, 43 *Id.* 159; *Smith v. Appelgate*, 1 *Daly*, 91).

In determining the question of payment by note or bill, the distinction between the payment of a precedent debt and one created at the time the note or bill is given must be observed, for the rule applicable to the

one class of cases has no application to the other. For example, if the note is received on a precedent debt, the presumption is that it was not taken as payment, and the *onus* of establishing that it was agreed to be so taken is upon the debtor (*Noel v. Murray*, 13 *N. Y.* 167; *Gibson v. Tohey*, 46 *Id.* at p. 640); while, on the other hand, if the note is received at the time the debt is contracted, the presumption is that it was given in payment (*Noel v. Murray*, *Gibson v. Tohey*, *supra*).

The reason for the first presumption is that a person should not easily be presumed to abandon the rights which belong to him, and as a novation implies an abandonment by the creditor of the first claim, to which the second is substituted, it ought to be expressly stated to be effective (*Pothier on Obligations*, vol. 1, pp. 385, 386), and the reason for the second seems to be "that taking a note for goods sold is a payment, because it is a part of the original contract; but paper is no payment where there is a precedent debt, for when such is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon" (Chief Justice HOLT in *Ward v. Evans*, 2 *Lord Raym.* at p. 930).

In the present case, the notes of the third party were given for a precedent debt, under circumstances which, on the authorities cited, do not amount in law to a payment.

Another objection urged by the defendants to the plaintiff's right of recovery, is that after the two notes in question were given, a balance of sixty-seven dollars and eighty-five cents remained due from the defendants, and the plaintiffs received this amount, and receipted the defendant's account in full.

This circumstance does not establish the plea of payment.

In *Muldoon et al. v. Whitlock et al.* (1 *Cowen*, 290), the plaintiffs sold stores for a ship to F. & S., the ship's husbands and part owners, on a credit of four months,

which stores were charged to the owners of the vessel by name. A few days after the sale, the plaintiffs rendered two bills to F. & S., charging them only, and about two months after the sale, took the sole note of F. & S., at an extended credit of eight months, giving a receipt for the note, as in full for the stores. This note not being paid, and F. & S. becoming insolvent, it was held that the other owners were not thereby discharged, but were liable in assumpsit for the original consideration. That being originally liable, the subsequent delivery of the bills charging the ship's husbands alone did not discharge the other owners. That they were not discharged by taking the note, which being for a precedent debt, was not a satisfaction until actually paid; unless expressly agreed to be received as payment, and that the receipt of the note in full was not evidence of such an agreement, and a recovery against all the owners upon the original cause of action was sustained (see also 3 *Bosw.* 497; 37 *N. Y.* 312; and 48 *Id.* 204).

In *Roberts v. Fisher* (43 *N. Y.* 159), the defendant being indebted to the plaintiff for goods sold, gave him the promissory note of a third person, which was received by him in full payment and discharge of the debt. The maker of the note was insolvent at the time of the transfer of the note, although this fact was unknown to the parties; and it was held that it was a case of mutual mistake of fact, and that the plaintiff was entitled to recover from the defendant his original debt.

Judge PECKHAM, in delivering the opinion of the court in the last case, remarked that "upon broad principles of justice it would seem that a man should not be allowed to pay a debt with worthless paper, though both persons supposed it to be good."

Upon the same principle, the court of errors held that "payment in the bills of an insolvent bank is not a satisfaction of a debt, although at the time and place of payment the bills are in full credit, and the parties

to the transaction are wholly ignorant of such insolvency, if previous to such payment the bank has in fact become insolvent (*Ontario Bank v. Lightbody*, 13 *Wend.* 101, and see *Thomas v. Todd*, 6 *Hill*, 340). The application of these principles to the facts of the present case effectually dispose of it.

The maker of the two notes given by the defendants to the plaintiffs was insolvent at the time the plaintiffs received them, a fact then unknown to the parties, but publicly announced shortly afterwards. Upon the authorities cited, it is evident that these notes did not operate in law as a payment of the plaintiffs' debt.

The plaintiffs are, therefore, entitled to judgment for the amount claimed, with interest.

III.

Tender of payment.

A mere offer to pay is not a tender. The money must be actually produced and paid down, unless the creditor, by some positive act or declaration, dispenses with this being done (*Strong v. Blake*, 46 *Barb.* 227; *Hornby v. Cramer*, 12 *How. Pr.* 490). An offer to draw a check is not a tender, although declined (*Dunbar v. Jackson*, 6 *Wend.* 22; *McIntire v. Clark*, 7 *Id.* 330), and where the debtor had the money in his pocket, and told the creditor that he was ready for him, but the creditor did not know that the debtor had the money with him, this was held to be no tender (*Bakeman v. Pooler*, 15 *Wend.* 637), and the tender must in general be made directly to the creditor (*Hornby v. Cramer*, 12 *How. Pr.* 490; *Smith v. Smith*, 2 *Hill*, 351; 25 *Wend.* 405), and a tender to a clerk of a sub-agent of the creditor is insufficient, unless it is shown that such clerk had authority to receive the money (*Hargous v. Lahens*, 3 *Sandf.* 213), and the tender must be without any conditions, terms, or qualifications,

and without any protest against liability for the debt (*Wood v. Hitchcock*, 20 *Wend.* 47); where the party making the tender demands a receipt or satisfaction piece as a condition, the tender is illegal (*Roosevelt v. Bulls Head Bank*, 45 *Barb.* 579); and tender of money before it is due is ineffectual (*Mitchell v. Cook*, 29 *Barb.* 243); and an absolute refusal to receive the money, or to do the act in consideration of which the money is to be paid, is a waiver of tender (*Murray v. Roosevelt*, *Anth. N. P.* 138; *Vaupell v. Woodward*, 2 *Sandf. Ch.* 143; *Stone v. Sprague*, 20 *Barb.* 509; *Data v. Fiedler*, 1 *E. D. S.* 463; *Slingerland v. Morse*, 8 *Johns.* 474; *Everett v. Saltus*, 15 *Wend.* 474; *Warren v. Mains*, 7 *Johns.* 476); and if tender is refused on a specified ground, the creditor can not afterwards raise any other objection which, had he stated it then, might have been obviated (*Hull v. Peters*, 7 *Barb.* 331; 10 *Abb. Pr. N. S.* 484; 21 *N. Y.* 547); and a tender having been refused because not made in time, objection can not afterwards be taken that the tender was not in money (*Duffy v. O'Donovan*, 46 *N. Y.* 223); a tender does not extinguish a money debt, but merely stops the interest (*Raymond v. Bearnard*, 12 *Johns.* 274; *Hunter v. Le Conte*, 6 *Cow.* 728); and a tenant can in no case legally demand a receipt as a condition of paying his rent (45 *Barb.* 579; 20 *Wend.* 47; 23 *Id.* 342; 21 *N. Y.* 581).

Plea of tender.

A plea of tender before action should allege the tender and refusal, and that defendant has always been, and still is, ready to pay (8 *Barb.* 408; 5 *Abb.* 358; 23 *Barb.* 490; 2 *E. D. Smith*, 197; 2 *Denio*, 197), and to keep the tender good the amount tendered must be paid into court (2 *E. D. Smith*, 197; 25 *How.* 464); and notice of such payment must be given to the plaintiff's attorney (25 *How.* 464). The answer should aver that the money has been brought into court (7 *Robt.* 389; 21 *N. Y.* 343). A defense of tender *after* action commenced, must state the amount tendered, and should include interest and costs to the time of the tender (8 *How.* 258); and the amount must be paid into court (45 *Barb.* 579; 2 *Hill.* 538; *Cowen's Tr.* § 1148 to § 1160; 7 *Robt.* 389; 36 *How. Pr.* 26; 5 *Abb. Pr. N. S.* 18; 25 *How. Pr.* 464; 45 *Barb.* 554; 30 *How. Pr.* 226); a party who makes a tender is bound to keep the same money at all times ready for payment when demanded, and when

sued is bound to bring it into court (*Roosevelt v. Bulls Head Bank*, 45 *Barb.* 579).

Effect of tender.

Payment of money into court admits the cause or causes of action stated in the complaint, to the amount paid in, but beyond that the defendant may make his defense (*Cov. Tr.* § 1154; 7 *Johns.* 315; 2 *Wend.* 431), and the plaintiff is in any event entitled to the amount tendered or paid in (1 *Barb.* 115; 1 *E. D. Smith*, 498; 1 *Wend.* 191; 18 *Id.* 390).

If the defendant pays in court less than is due, the plaintiff is entitled to a verdict and judgment for the whole amount, and must credit the payment on the judgement, for this preserves his right to costs; but if the payment equals the debt, defendant should have a verdict (*Dakin v. Dunning*, 7 *Hill*, 30).

IV.

Appropriation of payments.

A debtor paying money to a creditor to whom he owes several debts, may appropriate it to which he pleases. In default of an appropriation by the debtor, the creditor has the right to make the application. If both omit to do it, and the demands consist of a running account, the presumption is that the first items of the account were intended to be satisfied; and where neither party makes the application, the law will appropriate the payments according to the justice and equity of the case, and sureties for the debt are governed by the same rules as to the appropriation of payments which apply to their principal, and where a general payment is made, the creditor is allowed a reasonable time to make the application; and an entry by the creditor of a general payment to the credit of an account does not preclude him from afterwards applying it to another demand, provided such entry be not communicated to the debtor, for to inform the debtor of the entry, is an appropriation of the payment to that account. Accordingly, where the relation of landlord and tenant existed, the latter being bound to pay his rent quarterly, and there were other extensive dealings between the parties and the landlord kept an

account with the tenant, in which he charged the rent as it became due along with other accounts against the tenant, and credited the payments made by the latter, and from time to time rendered these accounts to the tenant; and in an action of covenant for the rent against a surety of the tenant, it was held that the payments must be applied in satisfaction of the several items of the account, including the rent, according to the priority of the time in which they were charged in the account (*Allen v. Culver*, 3 *Den.* 284, cited and approved in *Seymour v. Marvin*, 11 *Barb.* 90; *Hunter v. Osterhoudt*, *Id.* 34; *Dows v. Morewood*, 10 *Barb.* 189; *Peck v. Minot*, 4 *Robt.* 338; *Smith v. Marvin*, 25 *How.* 325; *Truscott v. King*, 6 *N. Y.* 165; *Com. Bk. v. Union Bk.*, 11 *N. Y.* 214; *Smith v. Marvin*, 27 *N. Y.* 142).

CHAPTER VII.

REMEDIES OF THE LANDLORD AND OF HIS GRANTEES
AND ASSIGNEES.

- I. Various remedies of the landlord.
- II. Remedies of executors.
- III. Remedies of grantees and assignees.
- IV. Effect of judgment upon other remedies.

I.

Various remedies of the landlord.

The remedies furnished by the law for the protection of real property, embrace actions for the redress of injuries thereto, and trespasses thereon, and for the enforcement of all agreements respecting the occupation thereof, and for the collection of all rentals accruing from the tenants in possession, as well as actions and appropriate proceedings for the recovery of possession thereof, in cases where the same has either been wrongfully invaded or improperly withheld. If, therefore, the tenant fails to pay his rent, the landlord may maintain the common-law action of debt (*McKeon v. Whitney*, 3 *Den.* 452), or an action of covenant, upon the covenants contained in the demise (*Id.*), or he may sue for use and occupation (see page 59, *post*), or he may institute summary proceedings under the statute, to enforce the payment of the rent, or to obtain the possession of the demised premises in case of its non-payment.

If the tenant holds over after the expiration of his term, he may be removed as an overholding tenant by summary proceedings under the statute. The statute law and practice in regard to forcible entries upon lands

and tenements and forcible detainers thereof, and in regard to summary proceedings for the recovery of possession of lands in certain cases will be found in subsequent chapters of this treatise.

These summary proceedings were intended as auxiliaries to and not substitutes for the action of ejectment, which is a more comprehensive, as well as a more expensive and dilatory remedy.

The statute concerning ejectment and other actions relating to real property will be found in 2 *Edm. R. S.* (pp. 311, 349, 350, 521).

If the tenant by his own wilful or negligent conduct, injure the inheritance, the landlord has an action for the injury, and although the former action of waste was abolished by the Code (§ 450), the wrongs remediable thereby are made the subject of a civil action, and the rights and liabilities of the parties are fixed by the Revised Statutes (2 *Edm. R. S.* pp. 160, 344).

Ordinary trespasses upon land by strangers, may also be punished by action (2 *Edm. R. S.* p. 349), and an act was passed by the legislature in 1853 (ch. 573, p. 1055), for the more effectual prevention of wanton and malicious mischief, which act as amended in 1865 (ch. 222, p. 359), provides that "any person who shall maliciously or wantonly injure or deface any monument, or work of art, building, fence or other structure; or destroy or injure any ornamental tree, shrub or plant, whether situated on any private ground, or on any street, public place, public or private way, or cemetery; or who shall paint or print upon, or in any manner place upon or affix to any stone or rock, not a part of a building, or upon or to any bridge or tree, any word, letter, character or device, stating, referring to or advertising, or intended to state, refer to or advertise the sale or manufacture of any property or article, profession, business, exhibition, amusement or place of amusement or other thing; and any person who shall directly or indirectly cause any such act to be done, or

shall aid therein, shall be deemed guilty of a misdemeanor; and upon conviction, shall, for each and every such offense, be punished by a fine not exceeding two hundred and fifty dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment. Every such person shall, moreover, be liable, whether before or after conviction as aforesaid, to an action in favor of any person injured, or owning, or possessing any land, premises upon which any such act has been done; in which action damages may be recovered of not less than five dollars, and in addition to that sum, of not more than five times the amount of the actual damage sustained; provided, however, that nothing herein before contained shall apply to any word, letter, character or device relating to any sale, manufacture, profession, business, exhibition or amusement held, carried on or to take place within fifty rods of the place where such word, letter, character or device shall be painted, printed, placed or affixed, and which may be so painted, printed, placed or affixed upon the lands or premises owned or possessed by the person who shall have, by himself or by any other, painted, printed, placed or affixed the same."

The wanton, malicious, and secret destruction of personal property of another,—*e. g.*, mutilating harness in a spirit of wantonness and revenge, although committed in daytime, amounts to a malicious mischief, and is an indictable offense at common law (*People v. Moody*, 5 *Park Cr.* 568).

If the landlord finds that the occupants of his premises are using them for purposes of prostitution or for the carrying on of illegal trades, he will find in the subsequent chapters of this treatise, the statute law and practice upon the remedies furnished by the legislature for their removal, and for the abatement of the nuisance.

And in order to protect the reversionary rights of the landlord while his premises are in the possession of tenants, the statute provides that "a person seized of an estate in remainder or reversion, may maintain an action of waste or trespass, for any injury done to the

inheritance, notwithstanding any intervening estate for life or years" (1 *Edm. R. S.* p. 701, § 8, and see 29 *Barb.* 15 ; 13 *Johns.* 268 ; 11 *Id.* 429).

Where recovery may be had for use and occupation.

The statute provides that "any landlord may recover in an action on the case, a reasonable satisfaction for the use and occupation of any lands or tenements, by any person under any agreement not made by deed ; and if any parol demise or other agreement, not being by deed, by which a certain rent is reserved, shall appear in evidence on the trial of any such action, the plaintiff shall not on that account be debarred from a recovery, but may make use thereof as evidence of the amount of the damages to be recovered" (1 *Edm. R. S.* p. 698, § 26).

In order to maintain an action for use and occupations, the conventional relation of landlord and tenant created by agreement must exist between the parties ; title in the plaintiff and use and occupation by the defendant are not enough (*Wood v. Wilcox*, 1 *Den.* 37 ; *Croswell v. Crane*, 7 *Barb.* 191 ; *Hall v. Southmayd*, 15 *Id.* at p. 36 ; *Pierce v. Pierce*, 25 *Id.* 243 ; *Sylvester v. Ralston*, 31 *Id.* 286 ; *Jennings v. Alexander*, 1 *Hill.* 154 ; *Hurd v. Miller*, 2 *Id.* 540 ; *Taylor v. Bradley*, 4 *Abb. Ct. App. Dec.* 363 ; 53 *Barb.* 258 ; *Richey v. Hinde*, 6 *Ohio*, 371 ; *Butler v. Cowles*, 4 *Id.* 205 ; *Ryan v. Marsh*, 2 *N. & McC.* 156 ; *Henwood v. Cheeseman*, 3 *S. & R.* 500 ; *Stockett v. Watkins*, 2 *Gill & Johns.* 326 ; *Wiggin v. Wiggin*, 6 *N. H.* 298 ; *Brewer v. Craig*, 3 *Harr.* 214 ; *Curtis v. Treat*, 8 *Shep.* 525 ; *Brolasky v. Ferguson*, 48 *Penn. St.* 434 ; *Steuart v. Fitch*, 2 *Broom*, 17 ; *Edmonson v. Kite*, 43 *Mo.* 176), and action for use and occupation will not, therefore, lie against an under-tenant (*Jennings v. Alexander*, 1 *Hill.* 154), except under special circumstances (3 *N. Y.* 286). It has been urged that the action might perhaps lie

against an assignee of the term, on the general ground of liability, *e. g.*, the privity of contract in respect of the estate (*Stevenson v. Lambard*, 2 *East*, 575 ; *Staines v. Morris*, 1 *Ves. & B.* 8, 11 ; *Burnett v. Lynch*, 5 *Barn. & Cres.* 589 ; *S. C.* 8 *Dow. & Ry.* 368 ; *Mathews v. Sawell*, 8 *Taunt.* 270) ; but this form of action is founded on privity of contract, and not on privity of estate (*Henwood v. Cheeseman*, 3 *S. & R.* 500), and upon this ground the court of appeals held in *Bedford v. Terhune* (30 *N. Y.* 453), that a lessor can not recover upon a complaint for use and occupation, where it appears from the evidence that there was a lease of the premises to other parties, and that the defendants were in as assignees of the term, but that in such a case the court might on the trial allow an amendment of the complaint so as to conform to the proof, and permit a recovery for the rent due upon the lease, where it did not appear that the defendants had been surprised. It was held (in *Brewer v. Craig*, 3 *Harr.* 214 ; *Redden v. Barker*, 4 *Id.* 179 ; *McNair v. Schwartz*, 16 *Ill.* 24 ; *Dixon v. Haley*, *Id.* 145 ; *Smith v. Steuart*, 6 *Johns.* 46 *S. P.* ; *Vanderheuvil v. Storrs*, 3 *Conn.* 203 ; *Bell v. Ellis*, 1 *Stew. & Port.* 284 ; *Little v. Pierson*, 7 *Pick.* 301 ; *Jones v. Tipton*, 2 *Dana*, 295 ; *Bancroft v. Wardell*, 13 *Johns.* 489 ; 32 *Vt.* 551) that an action for use and occupation would not lie against a person in possession of land under a contract of sale ; there are other cases, however, holding that if a party is let into possession under a contract of sale which goes off, he is liable in use and occupation at the suit of the vendor, for the period during which he continues in possession, after the contract went off, although he might not be for occupation prior to the rescinding of the contract (*Howard v. Shaw*, 8 *M. & W.* 118 ; *Little v. Pearson*, 7 *Pick.* 301 ; *Dwight v. Cutler*, 3 *Mich.* 566 ; *Patterson v. Stoddard*, 47 *Maine*, 355) ; and in Illinois it lies in this case by statute February 20, 1861 (*Hadley v. Morrison*, 39 *Ill.* 392) ; and where one entered under a verbal contract of purchase, void by the statue, and

continued in possession for a year, an action will lie against him for use and occupation (*Pierce v. Pierce*, 25 *Barb.* 243); but where one goes into possession under a contract of purchase, and in consequence of the vendor's refusal to perform, the purchaser abandons the premises, he will not be liable, either to rent or for use and occupation, (*Sylvester v. Ralston*, 31 *Ib.* 286). The action will not lie against a mere trespasser (*Hurd v. Miller*, 2 *Hill.* 540; *Weaver v. Jones*, 24 *Ala.* 420), nor against a defendant whose possession is tortious; no contract existing in such a case (*Ryan v. Marsh*, 2 *N. & McC.* 156; *Henwood v. Cheeseman*, 3 *S. & R.* 500; *Stockett v. Watkins*, 2 *Gill. & Johns.* 326; *Wiggin v. Wiggin*, 6 *N. Hamp.* 298; *Rickey v. Hinde*, 6 *Ham.* 371), and where the owner agrees to give a lease and the tenant enters, but the owner then refuses and tenant quits, he is not liable for use and occupation (*Greaton v. Smith*, 33 *N. Y.* 245; *S. C.*, 1 *Daly*, 380); but where there is an agreement to demise a house for five years, and leases to be executed, under which the party enters, and subsequently refuses to accept a lease, the owner may maintain assumpsit for the use and occupation (*Little v. Martin*, 3 *Wend.* 219), and if a man gets into a house without the privity of the owner, although they may afterwards enter into a negotiation for a lease, but differ about terms, and the negotiation goes off; or if after being let into possession under an agreement to sign a written lease, and find surety for the rent, he does neither, no species of tenancy is created, but the occupant in either case becomes a mere trespasser (*Doe v. Pullen*, 2 *Bing. N. C.* 749; *Doe v. Quigley*, 2 *Camp.* 505; *Doe v. Cartwright*, 3 *B. & A.* 326; *Fisk v. Mooers*, 11 *Rob. La.* 279; *Doe v. Burt*, *Walm. & H.* 3). The payment of rent will be *prima facie* evidence of tenancy, unless the defendant rebuts it by showing that it referred to some other relation or was paid under a mistake (*Comyn. L. & T.* p. 519, 2 ed. note).

The existence of the relation may in some cases be implied from circumstances (*Coit v. Planer*, 4 *Abb. Pr. N. S.* 140 ; 6 *Duer.* 494 ; 25 *Barb.* 243), but the action will not lie while there is an outstanding lease in another (*Bedford v. Terhune*, 30 *N. Y.* 453 ; aff'g 1 *Daly*, 371). An entry or possession is necessary in order to maintain the action ; an agreement to take is not enough (*Wood v. Wilcox*, 1 *Den.* 37). It is not necessary, however, to prove manual occupation. If the power to occupy and enjoy is given by the landlord to the tenant, so far as the landlord is concerned he has performed his part, and the action is maintainable (*Hall v. Western Trans. Co.*, 34 *N. Y.* 284 ; *Mofatt v. Smith*, 4 *N. Y.* 126 ; *Little v. Martin*, 3 *Wend.* 220), and taking the key and entering without continued possession is sufficient (*Little v. Martin*, 3 *Wend.* 220, *supra*), and there is a slight difference between the phraseology of the English and American statutes, in regard to use and occupation ; the English statute contains the words "held or occupied" while the American statute does not (*Cleves v. Willoughby*, 7 *Hill*, 87, 88), and this difference must be remembered in considering the effect of the decisions under the two statutes. This form of action will not lie, after a recovery in ejectment for rent accruing after the day of the demise (*Birch v. Wright*, 1 *T. R.* 378). Nor against a tenant who holds over, after the expiration of his term, where proceedings have been instituted against him to turn him out of possession under the statute ; for such proceeding is in the nature of an action of ejectment, by which the relation of landlord and tenant is disowned (*Featherstonhaugh v. Bradshaw*, 1 *Wend.* 134 ; *Crane v. Hardman*, 4 *E. D. Smith*, 339). The plaintiff's remedy, in such case, is either by action of trespass for the mesne profits, or for double rent under the statute (*Id.* *Clarence v. Marshall*, 2 *Cr. & M.* 495), and in an action for use and occupation, where there has been a tenancy at a special annual rent, and there is a

holding over, the tenant will be deemed to hold upon the terms under which he entered ; but is not precluded by an agreement to pay a fixed sum for a term less than a year (*Evertson v. Sawyer*, 2 *Wend.* 507), and the rate of rent fixed in the lease is *prima facie* evidence of the value of the premises (*McCarty v. Ely*, 4 *E. D. S.* 375), and where a corporation have actually used and occupied land for the purpose of their incorporation, by the permission of the owner, it seems that they are liable to be sued in assumpsit for use and occupation, notwithstanding they have not entered into a contract under their common seal (*Lowe v. London R. R. Co.*, 14 *Eng. L. & Eq. R.* 18).

Rents dependent upon life of another.

The statute provides that “every person entitled to any rents dependent upon the life of any other, may, notwithstanding the death of such other person, have the same remedy by action, for the recovery of all arrears of such rent, that shall be behind and unpaid at the death of such other person, as he might have had if such person was in full life” (1 *Edm. R. S.* 697, § 20).

When rent has a preference over certain claims against deceased tenants.

The statute provides that “preference may be given by the surrogate (in the payment of debts by an executor or administrator), to rents due or accruing, upon leases held by the testator or intestate, at the time of his death, over debts of the fourth class, whenever it shall be made to appear to his satisfaction, that such preference will benefit the estate of such testator or intestate” (2 *Edm. R. S.* 89, § 30).

The fourth class over which rent as a claim has a preference, consists of “all recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts” (*Id.* § 27).

Enforcing compliance of conditions by action.

Courts of equity will frequently grant injunctions in the nature of a specific performance, to restrain the violation by a tenant of covenants contained in his lease. And where a lease restricted the use of premises to "the regular dry-goods jobbing business," and the lessees commenced selling goods at auction therein, it was held, although there was no damage, or irreparable injury done to the lessor, nor any nuisance at law, yet it was a breach of the covenant, and the lessor could have an injunction (*Steward v. Winters*, 4 *Sandf. Ch.* 587). So the defendants obtained from the plaintiff an agreement for a lease of a house adjoining the plaintiff's coach-making establishment, representing, after other and conflicting statements, "that they wanted it for a private house." There was also an agreement that the defendants should expend a certain sum in repairs. Immediately upon taking possession, the defendants proceeded to prepare the premises for the business of coach-making. And it was held, that the plaintiffs were entitled to an injunction (*Bennett v. Sadler*, 14 *Vesey*, 526). So where A, a lessee, a drug-gist, with notice that the landlord will not let the premises for a bar-room, agrees to sub-let to B for that purpose, and himself renews the lease, equity will restrain both A and B from using the premises for a bar-room (*Parkham v. Aicardi*, 34 *Ala.* 393). So the administrator of an insolvent estate, having an undivided interest in a block of stores, may enjoin a lessee of one of them from a use injurious to the income of all (*Id.*). But it is held that equity will not enjoin the use of leased premises for one purpose, merely because the lease contains a provision that they are to be used for another, unless it is also provided that they shall be used for the latter exclusively (*Brugman v. Noyes*, 6 *Wis.* 1). And where a lessee assigns his lease, with a covenant in the assignment that the assignee will not

carry on a certain trade on the premises, and the assignee underlets to one who has no actual notice of such restriction, the lessee may restrain this use against the under-tenant, or his assignee, although the restriction was not contained in the original lease. SIR JOHN ROMILLY, M. R., says: "If not, observe what the consequences would be. A man makes a lease of a large piece of land to a builder; the builder erects a building on it, and then assigns, making the assignee covenant not to carry on any noxious trade—as, for example, that of a soap-boiler—which would be injurious to the neighborhood.

"It is contended that the assignee may grant an under-lease, free from this covenant, to a person who may immediately afterwards set up this very trade to the injury of the whole neighborhood" (*Clements v. Welles*, *Law. Rep. (Eng. Eq. February*, 1866, pp. 199, 202).

The aid of a court of equity may be properly invoked by the owner of the fee, to restrain a sub-lessee from effecting such changes in the premises as are inconsistent with the terms of the lease, and as are likely to result in such injury to the owner's right as is not susceptible of adequate compensation at law (*Baughers v. Crane*, 27 *Md.* 36). So, too, the lessor may restrain his lessee, or those claiming under him, or acting by his authority, from making material alterations, as by changing a building rented for a post-office into a beer-hall (*Maddox v. White*, 4 *Md.* 72), or a dwelling into a warehouse (*Douglas v. Wiggins*, 1 *Johns. Ch.* 435). And the Commissioners of Appeals have held that the lessee, in the absence of an agreement to that effect, or an express permission from his lessor, is not justified in making material alterations in the demised premises; and that where such alterations were made without the landlord's permission, his right of action accrues as soon as they are made, and that he is not bound to wait until the expiration of the tenancy be-

fore bringing his action (*Agate v. Lowenbein*, 57 *N. Y.* 604). And equity will enjoin one who covenants not to carry on any calling in a house, or suffer it to be used to the annoyance of other houses, from keeping a girl's school, though the covenantee had allowed schools to be kept in other houses in the same neighborhood, and held under the same covenant (*Kemp v. Tober*, 4 *Eng. L. & Eq.*, 64). And where on a lease of premises to A, the lessee covenanted that they should not be used for any purpose extra-hazardous on account of fire and also not to underlet, it was held, where the premises were used for an extra-hazardous purpose by an under-tenant of A, the plaintiff might enforce the covenant, as to the use of the premises, by injunction against A and his tenant, and in the same action, obtain damages for the breach against A (*Gillilan v. Norton*, 6 *Rob.* 546). But where a lease contained a covenant on the part of the lessee, not to underlet to any one whose business or signs should be considered objectionable by the lessors, and it was held, that an injunction against making an objectionable use of the premises, could only issue against the sub-lessees, and not against both the sub-lessees and the lessee (*Importers v. Christie*, 5 *Rob.* 169).

In restraining by injunction the breach of a negative covenant, the interference of the court is in effect an order for specific performance. "An agreement," said Lord St. LEONARDS in *Lumley v. Wagne* (1 *D. M. & G.* 615), "may be as effectually performed in this way, as by an order for the performance of the thing to be done." Persons accordingly who had entered into a covenant not to ring church bells at stated periods, and had accepted the benefit of the covenant, were restrained from violating its obligations (*Martin v. Nutkin*, 2 *P. Wms.* 266). So also a public board of functionaries was restrained from erecting buildings on a plot of land opposite a club-house, contrary to covenant (*Lloyd v. London*, 2 *D. J. & S.* 568; and see *Foster*

v. Brimington R. Co., 2 *W. R.* 378). So also a railway company which had bought land from a man, and had covenanted with him in the purchase deed not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his, were restrained according to the terms of the covenant (*Id.*). So also a man who had purchased land under a condition prohibiting building thereon except after permission was obtained, was restrained from building before obtaining the permission required (Att.-Gen. v. Briggs, 1 *Jur. N. S.* 1084). So also the lessee of a house who had covenanted not to carry on any business or trade on the demised premises, was restrained from carrying on the trade or business of a baker, confectioner, beer-shop keeper (Hodson v. Coppard, 29 *Beav.* 4), hairdresser (Clements v. Welles, 1 *L. R. Eq.* 200), or auctioneer (Parker v. Whyte, 1 *H. & M.* 167). A covenant not to carry on the trade of a butcher is broken by selling raw meat, though it was not exposed in the shop windows, but was visible to passengers, if they looked in (Doe v. Spry, 1 *B. & Ald.* 617); and a covenant not to carry on business of a common brewer, or retailer of beer, is broken by the carrying on of the business of a retail brewer (Simons v. Farren, 1 *Bing. N. C.* 128). But a covenant not to use a "public house for sale of beer, wine, malt liquor, or spirits," is not broken by taking out an ordinary excise license, for the sale of beer not to be drank on the premises (Pease v. Coats, 2 *L. R. Eq.* 688); and a covenant not to carry on the business of a horse-hair manufacturer, is not broken by merely dealing in horse-hair (Harms v. Parson, 32 *Beav.* 328). The trade of a coach-maker does not fall within the provisions of a covenant against carrying on an offensive trade (Bonnett v. Sadler, 14 *Ves.* 526). Nor is the opening of a house as a public house a breach of covenant not to carry on a trade or business that might be offensive, or an annoyance, or disturbance, to any of the tenants of the lessor, or any part

of the neighborhood (*Jones v. Thorne*, 1 *B. & C.* 715 ; and see *Gorton v. Smart*, 1 *Sim. & S. T.* 66 ; *Hickman v. Isaacs*, 4 *L. T. N. S.* 285). And as to offensive trades, see *Barrow v. Richards* (8 *Paige Ch.*, 351) ; *Seymour v. McDonald* (4 *Sandf. Ch.* 503). So also the court will enforce by injunction a covenant in a lease not to assign without license (*Dyke v. Taylor*, 3 *D. F. & J.* 467), and see *Browne v. Lord Sligo* (10 *J. R. Ch.* 1). A court of equity will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, for the owner of land selling or leasing it, may insist upon such covenants as he pleases, touching the use and mode of enjoyment of the land ; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him, must abide by the definition, for it is evident that the extent of the injury is difficult to be ascertained or measured in damages (*Steward v. Winters*, 4 *Sandf. Ch.* 587). So, where a store was leased, with a covenant that it should not be used for any other purpose than a jewelry and fancy-goods store, an injunction was granted restraining the use of the tenement as a hat store (*Howard v. Ellis*, 4 *Sandf.* 369). So an injunction lies against a purchaser with notice, to prevent the use of a house as a family hotel, in violation of covenants entered into between owners and purchasers of the lot upon which such house is built, not to carry on the business of an inn-keeper (*Whateman v. Gibson*, 9 *Sim.* 196), and where the owners of land lay it out into house lots and orally agree among themselves that they shall be thus exclusively used, and convey the lots with a condition to that effect, any purchaser is bound by such agreement, and the owner of other lots may have an injunction enjoining him from converting a dwelling-

house into a public eating-house (*Parker v. Nightengale*, 6 *Allen*, 341). So where the owner of land divided it into lots and sold them to different purchasers, with a covenant or condition that no livery-stable, slaughter-house, glue-factory, &c., should be erected upon any part of the lots so conveyed, or any manufacture, trade, or business, which might be offensive to the neighboring inhabitants, it was held that the covenants in the deeds of the different lots were for the mutual benefit and protection of all the purchasers of such lots, and that the occupation of one of the lots as a coal yard was, upon the allegations of the bill, offensive (*Barron v. Richards*, 3 *Edwards Ch.* 96; 8 *Paige*, 351); and where adjoining proprietors covenant between themselves to build in a certain manner, or upon a uniform plan, or on designated lines, equity will enforce such agreement, as against such owners or as against a purchaser with notice (*Cole v. Sims*, citing *Whitman v. Gibson*, 23 *Eng. L. & Eq.*, 588), and equity will also stay any acts of waste upon the part of the tenant or those in possession.

Enforcing forfeiture for breach of condition.

The landlord having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to the laws of the kingdom, nor to the principles of reason or public policy (*Roe d. Hunter v. Galliers*, 2 *T. R.* 133), and it is by these general maxims persons must be guided when called upon to consider the validity of any particular covenant in a lease. Limitations, conditions and covenants may all be found in the same lease, but there is in some respects a wide distinction between them; a limitation determines the estate when the period of limitation arrives without entry or claim. A condition does not defeat the estate until entry by the grantor or lessor, or his heirs; and upon entry, the grantor or

lessor is as of his former estate. It is an express qualification of the estate contained in the lease, whereby the estate granted shall either commence, be enlarged, or be defeated upon performance or breach of such qualification or condition. A covenant is a mutual promise contained in the deed or lease, between the lessor and lessee, to do or forbear doing a specific act or specific acts; a condition and a covenant are frequently created in a lease by the same form of words, and the distinction between the two is illustrated by the case put by Coke. When the proviso comes alone it is a condition; but he says if a man by intendure lets land for years, "provided always, and it is covenanted and agreed between the said parties, that the lessee should not alien;" this is a condition by force of the proviso, and a covenant by force of the other words (1 *Inst.* 203 b). In case the condition is broken, the lessee may elect to which he will resort, for he can not have both, as they are incompatible remedies.

If the tenant fails to observe the covenants upon his part contained in the lease, he may be enjoined by injunction at the suit of the landlord, as suggested at page 63 (*ante*) from continuing the violation, and if the lease contain a condition that upon default by the tenant in the performance of the covenants and conditions of the lease, the lease shall cease and determine, or be null and void, the estate becomes forfeited upon the breach (*Garrett v. Scouten*, 3 *Den.* 334); the breach, however, does not render the lease absolutely void, but voidable only, at the option of the lessor (*Norman v. Wells*, 17 *Wend.* 136; *Clark v. Jones*, 1 *Den.* 516); and if the landlord desires to insist upon the forfeiture, he must enforce the same by action of ejectment for the possession of the premises; and if he elects to enforce a forfeiture of the lease, he can not in the meantime treat the lessee as his tenant, rightfully in possession, so as to obtain an equitable claim to the accruing rents by

virtue of his lease, for by bringing ejectment for the forfeiture, he has chosen to treat the tenants as trespassers from that time (*Stuyvesant v. Davis*, 9 *Paige*, 427 S. P. ; *Linden v. Hepburn*, 3 *Sandf.* 668 ; S. C. 5 *How. Pr.* 188 ; 9 *N. Y. Leg. Obs.* 80). With respect to provisoes for re-entry upon the breach of covenants and conditions, no general principle can be laid down, excepting that which arises out of the maxim of our law, that every doubtful grant shall be construed in favor of the grantee ; namely, that the breach complained of must come within the very letter of the covenant, or the lease will not be forfeited ; and the following illustrations will show the application of this general rule to particular cases.

Where the lessee covenanted with the lessor not to assign his term without the lessor's consent, and afterwards devised his term without such consent, it was holden not to amount to a forfeiture, for a devise is not a lease (*Fox v. Swan*, *Sty.* 482), and where the lessee covenanted not to demise, assign, transfer, or set over, or otherwise do away the indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, and afterwards made an under-lease of the premises, it was held not to be a breach of the covenant, or a forfeiture of the term, for an under-lease is not an assignment (*Crusoe d. Blencowe v. Bugby*, 3 *Wils.* 234 ; *Jackson v. Silvernail*, 15 *Johns.* 278 ; *Jackson v. Groat*, 7 *Cow.* 285, 287 ; *Martin v. O'Conner*, 43 *Barb.* 514 ; *Davis v. Morris*, 36 *N. Y.* 569, aff'g. 35 *Barb.* 227 ; *Hargrave v. King*, 5 *Ired. Eq.* 430) ; and a covenant not to underlet any part of the premises without license, is not broken by taking in lodgers (*Doe v. Laming*, 4 *Campb.* 77). Nor will a covenant "not to let or underlet the whole or any part" of the demised premises preclude an assignment of the whole interest (*Lynde v. Hough*, 27 *Barb.* 415), but a condition not to *set, let, or assign over* the demised premises, or any part thereof, comprehends

under-leases (Roe v. Harrison, 2 T. R. 425 ; Roe v. Sales, 1 Maule & S. 297 ; Greenaway v. Adams, 12 Ves. 395 ; Crusoe v. Bugby, 3 Wils. 234 ; Doe v. Worsley, 1 Campb. 20).

Where the lessee enters into covenants not to assign, the courts will distinguish between those acts done by him voluntarily, and those which pass *in invitum*, and will not hold the latter to be a breach of the covenant. Thus, if the lessee become bankrupt, and the term be assigned under the commission (Roe v. Sales, 1 M. & S. 297), or if the term be sold under an execution upon a judgment (Doe v. Carter, 8 T. R. 57, 300), in neither of which cases will a forfeiture be incurred, and where the landlord seeks to enforce a forfeiture for non-payment of rent, his right to re-enter is not perfected until he makes a demand of the precise sum due for rent, at the time and place required by law (Academy of Music v. Hackett, 2 Hill. 217) ; and where an estate for life is subject to be divested by the breach of a condition subsequent, a breach which forfeits the estate destroys the lien thereon of a judgment against the tenant for life (Moore v. Pitts, 53 N. Y. 85).

The forfeiture may be waived by the landlord's consent or act. Thus : Receiving rent which accrued subsequent to the forfeiture, with full knowledge of the facts creating the forfeiture (Ireland v. Nichols, 46 N. Y. 413, aff'g 2 Sweeny, 289 ; Murray v. Harway, 56 N. Y. 337).

Nuisances upon adjoining premises.

No person has the right to make any erection upon his land, that projects over the land of his neighbor. The erection of a house or building of any kind by one land owner, so that the eaves thereof overhang the land of another, is a nuisance, and an action lies therefor even though no special injury results therefrom (Tucker v. Newman, 11 Ad. & El. 40 ; Wright v. Williams, 1 M.

& W. 77 ; *Carlyon v. Lovering*, 1 *H. & M.* 784 ; *Ahsley v. Ashley*, 6 *Cush.* 70), and where an action was commenced for erecting a house with a cornice projecting over the lands of the plaintiff, by means of which quantities of rain fell from the cornice upon the plaintiff's garden and did damage, and by reason of which the plaintiff was greatly annoyed and incommoded in the use and possession of his premises, and it was held by the court that the projection in itself was a nuisance from which the law inferred a damage, and that the plaintiff could maintain his action in respect to the projection alone, even though no rain had fallen, and that the plaintiff was not confined to damage from the rain (*Fry v. Prentice*, 14 *L. T. N. S.* 298), and Comyn in his Digest, vol. 1, p. 427, says : " An action upon the case lies for a nuisance to the habitation or estate of another ; as if a man build a house hanging over the house of another, whereby the rain falls upon it, or fixes a spout upon his own house, whence the rain falls into the yard of another and injures the foundation of his building."

In *Aiken v. Benedict* (39 *Barb.* 400), which was an action for damages by reason of the erection of a house by the defendant upon the line of his land, in such a manner that the eaves and gutters projected over the land of the plaintiff, and it was held an action for the nuisance would lie.

In *Sherry v. Frecking* (4 *Duer*, 452), the defendant erected a building upon a lot adjoining one owned by the plaintiff, and in so doing encroached upon the soil of the plaintiff's lot some four or five inches, and also overhung the same with his wall at the top of said building some ten or twelve inches. The plaintiff brought his action under the Code for the recovery of the premises, and the damages for its detention being a remedy in the nature of the common-law action of ejectment, and in his action sought to recover not only the soil actually encroached upon, but also the space which

was overhung by the defendant's wall. Upon the trial a verdict was rendered for the damages for withholding the strip of land, and the injury to the plaintiff's premises by the overhanging of the wall, and also for a recovery of the premises as claimed in the complaint. The supreme court in *Aiken v. Benedict* (39 *Barb.* 400), while sustaining the right to damages, deny the right asserted in the last case to maintain ejectment under such circumstances upon the ground that ejectment will not lie for anything whenever entry can not be made, or of which the sheriff can not give possession.

In *Pendruddock's* case (5 *Coke*, 101), it was held that the person injured by the nuisance might abate it, but this would only apply to cases where the thing is in itself a nuisance, and not where it may or may not become one (*Norrice v. Baker* 1 *Rolle*, 393), and although the party injured may at his election cut off that portion of the eaves that project over his land, and thus of his own motion abate the nuisance, yet he is not justified in so doing until he has suffered some special injury from it, but it is always unsafe for a person injured in this manner to interfere with the building, because the nuisance consists purely in the discharge of the water, either in its natural state or congealed into ice and snow upon his land, and the evil might be remedied by the wrong-doer by the employment of proper appliances, without the actual removal or destruction of the building, and in such cases the most prudent and indeed the only safe course to pursue, is to bring an action for the damages and for an abatement of the nuisance by the courts (*Shipley v. Fifty Associates*, 106 *Mass.* 194; 8 *Am. Rep.* 318; 101 *Mass.* 251; 3 *Am. Rep.* 346; *Ryland v. Fletcher*, 3 *H. L. C.* 330; *Bellows v. Sackett*, 15 *Barb.* 96; *Martin v. Simpson*, 6 *Allen*, 102; *Ball v. Nye*, 99 *Mass.* 582; *Wasburn on Easements*, 390; *Ely v. Supervisors*, 36 *N. Y.* 300; *Goldsmith v. Jones*, 43 *How.* 415).

II.

Remedies of executors.

The statute provides that the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies by entry, action or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as the lessor, grantee, or assignee had, or might have had, if the reversion had remained in him (1 *Edm. R. S.* 698, § 23), and further provides that "the executors or administrators of every person to whom any rent shall have been due and unpaid at the time of his death, may have the same remedy by action or by distress, for the recovery of all such arrears, that their testator or intestate might have had, if living" (*Id.* 698, § 21); and the statute further provides, "that when a tenant for a life, who shall have demised any lands, shall die on or after the day when any rent became due and payable, his executors or administrators may recover from the under-tenant, the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death" (*Id.* § 22).

If the landlord was possessed of an estate of inheritance, the estate upon his death vests in his heirs-at-law, in the absence of a last will and testament devising it to others, or placing the legal estate in trustees for the benefit of others, in which case the will designates the persons to whom and the conditions upon which the legal title is given. And executors acquire no title to or right of control over the real estate, unless the same be conferred by the will, which is the evidence of the right, if not the right itself. An administrator, therefore, has no interest in or control over

the real estate of his intestate (*Bridgewater v. Brookfield*, 3 *Cow.* 299). If, however, the estate of the intestate was merely that of a tenant for years, the estate would go to the administrator or executor as part of the personalty. And rent accruing from real estate after the death of the testator, as a rule goes to the heir, and the executor or administrator is only entitled to rent due at the time of the death of the deceased (*Wright v. Williams*, 5 *Cow.* 501; 2 *Johns. Cas.* 17, § 390; *Taylor's L. & T.*), and the person to whom the right of action belongs must prosecute all proceedings in respect thereto, and the person entitled to the possession must commence summary proceedings to recover it, and the heir and executor can not unite in the proceeding (*Griffin v. Clark*, 33 *Barb.* 47).

III.

Rights of grantees and assignees of landlord.

The statute provides that "the grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor" (1 *Edm. R. S.* p. 698, § 23).

Under this statute the grantee of the reversion can only take advantage of such covenants as run with the land (*Dolph v. White*, 12 *N. Y.* 296). The provisions of this statute, it is said in *Norman v. Wells* (17 *Wend.* 136), are in substance a transcript of 32 Hen. VIII, ch. 34, and do not extend to collateral covenants, but only

to covenants touching or concerning the thing demised, and in *Harbeck v. Sylvester* (13 *Wend.* 608), it was decided that the remedies of a grantee of demised premises are confined to remedies upon the lease, and did not extend to the prosecution of a suit in his own name upon a guaranty for the payment of the rent reserved in the lease given to his grantor, and that the Revised Statutes had not changed the rule in this regard. The Code has changed the rule, however (§§ 111, 112, 117), and this case was disapproved in *Allen v. Culver* (3 *Den.* 284), where it was held that the contract of the surety of the lessee, who by a separate covenant had guaranteed the rent, passes to the grantee of the reversion, who is entitled to sue thereon, and in *Slocum v. Clark* (2 *Hill.* 475), it was held that in order to confer upon the assignee a right to distrain the lease or land should be included in the assignment; a mere transfer of the rent remaining unpaid, does not carry with it the remedy by distress, and where a lessor who had taken the lessee's notes to secure the payment of rent granted the land absolutely, it was held that the title to the notes as well as to land passed, unless they were parted with by the lessor, who would in that event be personally liable for the amount (*Beebe v. Coleman*, 8 *Paige*, 392). The assignee of an assignee, as well of a reversion as of the term, is now said, in the English cases, to have the same rights both at common law and under the statute as the first assignee (*Hornidge v. Wilson*, 3 *Per. & D.* 641; *Campbell v. Lewis*, 3 *B. & A.* 392; *Fryer v. Combs*, 11 *Ad. & E.* 403). Rent not accrued is considered a part of the realty and passes with a grant of the reversion, as incident to the reversion, and not as a thing in action (*Van Wicklen v. Paulson*, 14 *Barb.* 654); where the landlord is made a party to a foreclosure of a mortgage on the land, and the decree directs him to surrender it to the purchaser, he, being entitled to possession until the surrender is to be made,

is entitled to the rents which accrue up to that time, even though such rent be payable in advance, so that a part of the term for which it is due comes after the surrender by him, and the consequent eviction of his tenant (*Giles v. Comstock*, 4 *N. Y.* 270). In an action against a surety for rent, it appeared that the landlord leased the premises after he had mortgaged them, and after the mortgage was under foreclosure. The tenant abandoned the premises where they were sold under foreclosure, and refused to continue the tenant of the purchaser. The purchaser having taken an assignment of the lease, sued the surety of the tenant for the rent which accrued after the sale and the abandonment. Held that the surety was not liable (*Simus v. Salters*, 2 *N. Y. Leg. Obs.* 180). If the lessor mortgages the lease and re-acquires it before the rent accrues, the tenant is liable to him for the rent (*Evertson v. Saroyer*, 2 *Wend.* 507). An assignment by the lessor of the lease, and all rents to become due, is merely an assignment of the rents ; and the lessee's covenant to leave the premises in repair at the end of the term, as it is not broken till the end of the term, belongs still to the reversioner, who alone can sue upon it (*Demarest v. Willard*, 8 *Cow.* 206) ; an assignee of the landlord is bound by the covenants real annexed to the estate, and running with the land ; but his liability extends only to covenants broken during the term when he is possessed of the estate (*Day v. Swackhamer*, 2 *Hilt.* 4). In *Moffatt v. Smith* (4 *N. Y.* 126), the lessor assigned the lease without the reversion, and the lessee paid rent to the assignee, and it was held that this created such a privity of contract between the tenant and the assignee, that the latter might sue in his own name for rent subsequently accruing under the lease. As to rights of grantees generally see *Van Rensselaer v. Hays*, 19 *N. Y.* 68 ; *Dolph v. White*, 12 *Id.* 296 ; *Main v. Green*, 32 *Barb.* 448 ; *Van Rensselaer v. Smith*, 27 *Id.* 104.

IV.

Effect of judgment upon other remedies.

A landlord, like any other creditor, is entitled to all the auxiliary and concurrent remedies of the law, appropriate to the full protection and enforcement of his rights, where the same are not in their character inconsistent with each other. Thus, at common law, the right of distress is not extinguished by an unsatisfied judgment for rent (*Snyder v. Kunkleman*, 3 *Penn.* 490 ; *Chipman v. Martin*, 13 *Johns.* 240 ; *Banleon v. Smith*, 2 *Binn.* 146 ; *Bates v. Nellis*, 5 *Hill*, 651 ; 3 *Price*, 572 ; 2 *A. & E.* 623 ; 4 *Nev. & M.* 462 ; *Ewer v. Clifton*, *Bull. N. P.* 182 ; *Harris v. Shipway*, 1744, cited by *Byles*, 304, note 1). An unsatisfied judgment does not satisfy the debt, nor merge or extinguish other remedies (*Drake v. Mitchell*, 3 *East*, 252 ; *Chipman v. Martin*, *supra* ; *Clapp v. Meserole*, 38 *Barb.* 661 ; *Tarleton v. Allhusen*, 2 *A. & E.* 32), and in *Gridley v. Rowland* (1 *E. D. S.* 670), the plaintiff brought a personal action against a contractor, who pleaded by way of defense, the pendency of other proceedings against the owner to foreclose a lien filed for the same debt, and the court held that the foreclosure proceedings against the owner were no defense to the action against the contractor, and that a party who has a claim against several for the same debt, may bring actions against each at the same time, and that it is only after a satisfaction has been recovered in one, that the same is a defense to the further prosecution of another, and that a proceeding under the lien law of 1851, was a mere foreclosure of a security.

Election between inconsistent remedies.

Where there exists an election between inconsistent

remedies, the party is confined to the remedy which he first prefers and adopts (*Rodermund v. Clark*, 46 *N. Y.* 354 ; *S. P. Goss v. Mather*, *Id.* 689 ; aff'g 2 *Lans.* 283), and if a vendor who is entitled to rescind the sale and re-take possession of goods delivered, actually elects to do so, instead of proceeding to collect the price, he disaffirms the sale, and can not afterwards sue for the price. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is forever gone (*Morris v. Rexford*, 18 *N. Y.* 552 ; *S. P. 1 Abb. Pr. N. S.* 432) ; and if a seller of goods, who has been defrauded in the sale, proceeds to judgment against the buyer, upon the contract of sale, after he is apprised of the fraud, his election is determined ; and he can not afterwards follow the goods, or the proceeds thereof, in the hands of a third person (*Bank of Beloit v. Beale*, 34 *N. Y.* 473), and the failure of the party to secure satisfaction by means of the remedy which he adopted, is no reason for permitting him to resort to the other (*Gross v. Mather*, 2 *Lans.* 283 ; aff'd in 46 *N. Y.* 689).

CHAPTER VIII.

RIGHTS OF THE TENANT.

- I. Right of possession and damages for withholding.
- II. Assigning lease and underletting premises.
- III. Right to remove fixtures.
- IV. Rights of under-tenant.

I.

Right of possession and damages for withholding.

To have and retain possession of the demised premises during the term, and to peaceably and quietly enjoy the same without disturbance, is the principal right which a tenant possesses; but on an ordinary demise of premises, without any special agreement to give possession, the landlord is under no obligation to put the tenant in actual possession; and it has been held, that where the lease from the landlord gives the tenant the legal right of possession, it is no ground of defense to an action for rent upon a lease, that at the time of making the lease there was a tenant in possession of the premises who still remains in possession, and that the defendant in consequence has never had possession. It must be shown that the tenant remaining in possession has a right so to do, either from the landlord or under a title paramount (*Gardner v. Keteltas*, 3 *Hill*, 330; *Mechanics & Traders Ins. Co. v. Scott*, 2 *Hill*, 550). But a lease of real property for a term commencing at a future day, *with an agreement to give possession*, gives to the lessee, when the day arrives, the right of possession; and an entry is not necessary to enable him to maintain ejectment, if the landlord, or one claiming under him, withholds pos-

session. But the lessee is not bound to resort to ejectment, under such an agreement, but may, at his option, bring his action against the landlord for damages for breach of the agreement (*Trull v. Granger*, 8 *N. Y.* 115), and it has been held, that a lessee may abandon his contract, if the lessor refuse to give possession on the day fixed (*Spencer v. Burton*, 5 *Blackf.* 57) ; and where it appears from the terms of a lease of a store being erected by the lessor, and from the subsequent acts of the parties, that they understood the property rented was to be a finished store, fit for immediate occupancy for the purposes for which it was leased, a covenant in the lease, on the part of the lessor, will be implied, that the store shall be finished and fit for use as a store, by the time stipulated for the commencement of the term, and in such a case, to entitle the lessor to recover the rent, it is incumbent on him to show that he has performed on his part. If the lessees have taken possession, so that they became vested with the term, a breach of the agreement, on the part of the lessor, will constitute no defense to an action to recover the rent reserved. They can only recoup the damages actually sustained (*La Farge v. Mansfield*, 31 *Barb.* 345 ; *The People v. Kelsey*, 38 *Id.* 269).

Damages for wrongfully withholding possession.

In an action by lessee against lessor, to recover damages for failure and inability to give possession, the rule of damages is the difference between the yearly value of the premises and the rent reserved (*Dean v. Reosler*, 1 *Hill.* 420 ; *Trull v. Granger*, 8 *N. Y.* 115), and for a breach of an agreement to give a lease, expenses incurred in preparing to remove to and occupy the premises, together with the difference between the real value of the lease and the contract price may be recovered (*Driggs v. Dwight*, 17 *Wend.* 71 ; *Giles v. O'Toole*, 4 *Barb.* 261 ; *Lawrence v. Wardwell*, 6 *Id.*

423); but the lessee can recover nothing for profits which he might have made if he had obtained possession (*Giles v. O'Toole*, 4 *Barb.* 261), nor for the loss he suffered by being obliged to crowd his goods into a small space while looking for another store, nor the expense or injury of packing them, such packing not being done with a view to removal into the defendant's store. Nor can he recover interest on the value of his stock during the period of finding a store (*Lowenstein v. Chappell*, 30 *Barb.* 241), and if the lease be of an opera house, to be finished by a certain time, the damages may include the tenant's expense of advertising the performance, but not the loss of anticipated profits (*Academy of Music v. Hackett*, 2 *Hill.* 217); and in an action by a lessee for damages for refusing to give possession of the premises, it is no defense that the defendant hired the premises, intending to keep a bawdy house therein, and the mere avowal by the lessee of an intent to employ the leased premises in an unlawful business does not constitute an offense, nor does it entitle the lessor to repudiate his contract (*O'Brien v. Brietenback*, 1 *Hill.* 304; but see the cases cited at page 36, *ante*).

Damages to evicted tenant.

A tenant in possession, evicted before the expiration of his lease, may recover the difference between the value of his lease for the unexpired term, and the stipulated rent. If evicted at a season when the expense of removing is greater than it would have been at the end of the term, he may recover such extra expense, but he can not recover any increased rent he may be compelled to pay for other premises, without reference to the equality of their accommodation (*Chatterton v. Fox*, 5 *Duer*, 64; and see 1 *Id.* 342, and 24 *Barb.* 178).

II.

Assigning lease and underletting.

A tenant, unless restrained by express agreement, may without the consent of his lessor assign the lease

itself, or he may grant underleases for any number of years less than the term for which he holds the premises.

The effect of a covenant not to assign or underlet was considered at page 71 (*ante*), and the legal status of the under-tenant will be found stated in a subsequent portion of this chapter (page 88, *post*).

Upon an assignment by a lessee, and entry into possession by the assignee, though the latter becomes liable to the landlord for the rent, the original lessee remains liable as theretofore upon the covenants in the lease; payment by the assignee does not amount to a surrender by the lessee (*Damb v. Hoffman*, 3 *E. D. S.* 361; *s. P. Port v. Jackson*, 17 *Johns.* 239, *aff'd Id.* 479). Under a lease with a covenant that the lessee shall not assign without the lessor's consent, the lessee's assigning part of the premises with consent is not a severance of the original lease, but the lessee still remains liable for every act of his assignee, amounting to a breach of the covenant contained in the lease (*Jackson v. Brownson*, 7 *Johns.* 227), and an assignment of a lease upon the lessor's consent, where the lease requires such consent, does not discharge the lessee from liability on his covenant to pay rent (*House v. Burr*, 24 *Barb.* 525); and a general release of the lessee after an assignment does not discharge the assignee's liability for use and occupation (*McKeon v. Whitney*, 3 *Den.* 452).

Who are assignees.

[A lessee of whole unexpired term with covenant to pay rent to his immediate lessors, and a right of re-entry on their part, is deemed an under-tenant and not an assignee (*Martin v. O'Conner*, 43 *Barb.* 514). To render the assignee of a lease liable for rent to the lessor, the whole term of the lease must have been assigned. An assignment reserving the last day of the term does not render the assignee liable to the lessor (*Davis v. Morris*, 36 *N. Y.* 569, *aff'g* 35 *Barb.* 227). Third persons entering upon leased premises under an arrangement with the original tenant not fully disclosed, held, properly deemed assignees of the term, and not mere under-tenants; and therefore liable directly to the owner in an action for rent (*Bedford v. Terhune*, 30 *N. Y.* 453, *aff'g* 1 *Daly*, 371; 27 *How. Pr.* 422).

And where an administrator enters and takes the rents and profits of the demised premises he is personally liable as assignee of the term for all rents falling due after his entry (In the matter of Galloway, 21 *Wend.* 32 ; Fisher v. Fisher, 1 *Bradf.* 337 ; Rubery v. Stevens, 4 *Barn & Adol.* 241 ; Buckley v. Perk, 1 *Salk.* 317 ; Hargraves, case, 5 *Cooke R.* 31 ; *Wentworth on Executors*, 285). And an assignee for the benefit of creditors, if he enter into possession of the demised premises, is liable during occupancy (Morton v. Pinckney, 8 *Bosw.* 135 ; Jermain v. Patterson, 46 *Barb.* 9), but not after surrender (Young v. Peyser, 3 *Bosw.* 308) ; nor if he refuse to accept the lease (Bagley v. Freeman, 1 *Hill.* 196 ; Lewis v. Burr, 8 *Bosw.* 140 ; Journey v. Brackley, 1 *Hill.* 447.)

Liability of assignee.

An assignee of the term is always liable to the lessor for rent reserved, in the same manner and to the same extent that the lessee was, and the assignor also remains liable upon all his covenants to the lessor (Dolph v. White, 12 *N. Y.* 296 ; 3 *E. D. Smith*, 361 ; 17 *Johns.* 239 ; *Id.* 479), and is liable on all covenants that run with the land as covenants to repair and pay rent although not expressly named therein (Jacques v. Short, 20 *Barb.* 269), and when a covenant to pay rent becomes broken after an acceptance of an assignment, and during actual possession, the assignee is liable for the whole rent then becoming due (Holsman v. De Gray, 6 *Abb. Pr.* 79).

Discharge of assignee by further assignment.

An assignee is only bound by the covenants in the lease, so long as he retains possession, by himself or his tenants, and may relieve himself from liability for subsequent breaches by getting out of possession and assigning over (Armstrong v. Wheeler, 9 *Cow.* 88 ; Childs v. Clark, 3 *Barb. Ch.* 52 ; Astor v. L'Amoreux,

4 *Sandf.* 524; *Carter v. Hammett*, 18 *Barb.* 608), for the assignment destroys the privity of estate, which was the only ground upon which the assignee was liable (*Taylor's L. & T.* §§ 452, 680). The possession of the sub-tenant is the possession of the tenant and the assignee (*Carter v. Hammett*, 18 *Barb.* 508, and see 24 *Id.* 525; *Harding v. Crethorn*, 1 *Esp.* 57), and they must get him out (*Taylor's L. & T.* § 524).

Sale of leasehold estate.

A person agreeing to buy a specific lease, is (in the absence of misrepresentation on the part of the seller), as a rule, chargeable with notice of all the covenants and restrictions it contains (*Pope v. Garland*, 4 *Y. & C.* 397; *Spinner v. Walsh*, 10 *Ir. Eq.* 400), for a man who wishes to protect himself against unusual or particular covenants, should before purchasing inquire into the covenants and stipulations of the original lease, so as to know precisely the terms on which the property is held (*Pope v. Garland*, 4 *Y. & C.* 394; *Martin v. Cotter*, 3 *J. & L.* 506; *Cullen v. O'Mara*, *L. R. Ir.*; 1 *C. L.* 640); but if there be misrepresentation, so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the the real state of the case, the vendor is in such a case bound by the misrepresentation (*Pope v. Garland*, 4 *Y. & C.* 394). If, for instance, the terms of a particular covenant turn out to be of much more stringent description than they were represented to be, there is fraud (*Flight v. Booth*, 1 *Bing. N. C.* 377), and the reading of the lease at an auction by the auctioneer, is no excuse for a misdescription of the terms of the lease in the particulars of sale (1 *Bing. N. C.* 379; 6 *Beav.* 590; 6 *Hare*, 443).

III.

Right of tenant to remove fixtures.

It seems to be the general doctrine that chattels being a part of the trade of the tenant, and peculiarly

appropriated to it, may be removed during the tenancy ; thus engines and machinery firmly fixed to a building by a tenant for years, for the carrying on of a business or trade of a personal nature, are the personal property of the tenant, and removable at his will (*Cook v. Chaplain*, Trans. Co. 1 *Den.* 91 ; *Farrar v. Chau-fetete*, 5 *Id.* 527 ; 33 *Barb.* 410 : 20 *Johns.* 29). Things set up by a lessee during his tenancy for the purposes of his trade, as kettles and boilers in a tannery, stills in a distillery, tables and partitions, are personal property and are removable by the tenant (*Hill on Fixtures*, § 17). When put in by the tenant, he may remove gas fixtures (*Shaw v. Lenke*, 1 *Daly*, 487 ; *Beardsley v. Sherman*, *Id.* 325 ; *Lawrence v. Kemp*, 1 *Duer*, 363 ; 33 *Penn.* 522), or stoves (*Vreeland v. Southwoth*, 24 *Wend.* 191), or chimneypieces, hanging-glasses window-blinds, pumps, wainscot, grates, fixed tables, furnances, coffee-mills, cupboards, chandeliers, fireplace frames, and partitions (*Hill on Fixtures*, § 34), and such removal may be after the term has expired, if made during his possession (*Beardsley v. Sherman*, 1 *Daly*, 326). In *Moore v. Wood* (12 *Abb. Pr.* 393), it appeared that the tenant sunk a brick chimney three feet into the ground for a foundation, and pierced the roof, that the chimney could not be removed without being taken down, together with the machinery, which were erected and put into the building by the tenant for the purpose of trade, and the court held that the tenant had a right to remove them on being dispossessed for non-payment of rent, and that the landlord who directed the officer to prevent the removal was liable in an action for the conversion of the property, and that the value of the property for the purpose of removal was the measure of damages.

The right of a tenant to remove buildings is discussed in *Hillard on Real Property* (3d ed., vol. 1, pp. 5, 6, 7, 8), and in *Smith v. Benson* (1 *Hill*, 176) ; and see 10 *Barb.* 496 (*E. D. Smith*, 611) ; and although

the right is recognized in certain cases, yet it is clear that if buildings are erected upon the land of one person by another, without any authority or agreement in respect thereto, it becomes a part of the realty, and passes with the conveyance of the land ; and to take the case out of this principle, on the ground that the building was erected by a tenant for the purpose of trade and business, it is not enough to show that it was occupied for the purpose of business, but the existence of the relation of landlord and tenant must be made out by express proof or clear implication ; and it must also be shown that the building was erected by the tenant for the purposes of trade, and that he exercised his right of removal during the term (*Ritchmyer v. Moss*, 5 *Abb. Pr. N. S.* 44 ; 4 *Abb. Ct. of App. Decis.* 55), and as to the test in determining what are fixtures, see *Potter v. Cromwell* (40 *N. Y.* 287) ; *Voorhees v. McGinnis* (48 *N. Y.* 278).

IV.

Rights of the under-tenant.

The under-tenant is chargeable with knowledge of the contents of the original lease (*Cosser v. Collinge*, 3 *Myl. & K.* 283 ; *Grosvenor v. Green*, 28 *L. J. Ch.* 173), for although he is not personally liable for the rent reserved in the original lease, nor directly liable for breaches of the covenants in the original lease, yet he may be evicted by the original lessor for a forfeiture incurred by such breaches, and the original lessor may by injunction restrain the under-tenant from committing breaches of the covenants contained in the original lease ; so also, if default be made in the payment of the rent reserved in and by the original lease, the original lessor may by summary proceedings remove the lessee, and also all under-tenants or others in possession claiming under him, from the premises demised, unless the

rent claimed be paid before the warrant of dispossession is issued.

In other respects the same rights, remedies and liabilities attending the relation between the original landlord and tenant, apply in like manner to the relation between the latter and his tenant.

The under-tenant may protect his possessory right in the premises against trespassers and intruders, and punish any interference therewith, by the appropriate legal remedies.

Right of sub-tenant to pay original landlord.

Where the tenant of lands under a lease containing a right of re-entry for default in paying rent, sublets a part thereof, the sub-tenant in order to protect his possession may pay his rent to the original lessor, and it is not necessary to protect him in so doing, that the original lessor should threaten a suit or even demand the money. The right of the landlord to action for the rent, or to re-enter, is sufficient to render the payment by the tenant compulsory, and to render it a valid payment to and for the use of his landlord (*Peck v. Ingersoll*, 7 N. Y. 528).

Sub-lease and sub-lessee.

A lease, by the lessee, to a third person for the residue of his original term, reserving rent to himself, and a right to re-enter for breaches of covenant which required the sub-tenant to keep the covenants in the original lease, is a sub-lease as between them, and not an assignment of the original lease; and the lessee may re-enter for breach of the conditions, although he has no reversion (*Linden v. Hepburn*, 3 Sandf. 668; S. C., 5 How. Pr. 188; 9 N. Y. Leg. Obs. 80; *People v. Robertson*, 39 Barb. 9; s. p. *Post v. Kearney*, 2 N. Y. 394; aff'd 1 Sandf. 105). And where a lessee ex-

ecutes an instrument conveying the whole of his unexpired term, but reserving rent at a different rate and time of payment from the original lease, and a right of re-entry on non-payment and on breach of other conditions, also providing for a surrender of the premises to him on the expiration of the term, the instrument is a sub-lease, not an assignment (*Collins v. Hasbrouck*, 56 *N. Y.* 157); and a sub-tenant's covenant to repair is not a mere covenant of indemnity, but renders him liable to his lessor whether the latter has paid the original landlord or not (*Smith v. Coe*, 2 *Sweeny*, 332); and where a sub-lease contains a covenant by the under-tenant to pay taxes and assessments which his immediate lessors had covenanted with the owners of the land that they would pay, no action will lie by the original lessor, the owner, against the under-tenant, for the non-payment thereof. He being an under-tenant and not an assignee of the lease, the covenant is for the benefit of his immediate lessors (*Martin v. O'Conner*, 43 *Barb.* 514).

CHAPTER IX.

REMEDIES OF THE TENANT, AND OF HIS ASSIGNEES
AND PERSONAL REPRESENTATIVES.

- I. Rescission of lease for fraud or mistake.
- II. Other remedies of the tenant.
- III. Remedies of assignees and representatives.
- IV. Remedies of joint tenants.

I.

Rescission for fraud or mistake.

Besides the right of rescission and of damages growing out of fraudulent misrepresentations, upon the part of the landlord, as to any material matter connected with the demise, and operating as an inducing cause to the execution of the contract of hiring, the tenant may in a proper case be relieved in equity, from the obligations of the lease, upon the ground of mistake of fact, whenever such mistake can be clearly made to appear by competent evidence. If the mistake be upon the part of the tenant, he may file his bill in equity, claiming the rescission of the contract, upon the ground that he has become bound by a contract which he never intended to make, and never would have made, but for a mistake he was laboring under in regard to a material fact (Smith *v.* Macklin, 4 *Lans.* 41 ; *Adams Eq.* 171 ; Rider *v.* Powell, 28 *N. Y.* 310-316) ; and where relief is sought in equity against a written agreement on the ground of mistake or surprise, parol evidence is admissible to show that the written agreement is contrary to the real terms of the contract, and that therefore the written agreement ought to be rescinded (Price

v. Ley, 33 *L. J. C.* 530-532), and the law in regard to personal property seems to be settled, that if a man sells a different interest from that which he pretends, and especially if the contract be founded in ignorance and fraud, the purchaser of a chattel may return the chattel, if he does it immediately on discovery of the imposition, and thereby rescind the sale (*Kettletas v. Fleet*, 7 *Johns.* 331, and cases cited); and upon the same principle, misrepresentations as to the boundaries or territorial extent of lands have always been regarded as material (*Clark v. Baird*, 9 *N. Y.* 183; *Whitney v. Allaire*, 1 *Id.* 305).

Where by mutual mistake of fact the lease fails to express the true agreement between the parties, it may in a proper case be reformed in equity upon a bill filed for the purpose (*O'Donnell v. Harmon*, 3 *Daly*, 424; *Nevius v. Dunlap*, 33 *N. Y.* 676; *Quick v. Stuyvesant*, 2 *Paige*, 84; *Leavitt v. Palmer*, 3 *N. Y.* 19; *Pitcher v. Hennessy*, 48 *N. Y.* 415; *Mills v. Lewis*, 37 *How.* 418). In an action for the reformation of a written agreement, on the ground of mistake, no fraud being proved, the following rules are observed :

1. The mistake must be plain and clearly proved.
2. It must have been a mutual mistake.
3. The mistake must be of fact, and not of law.

4. It must be clearly shown to the court what the real contract was. If any doubt be left on this point, the written contract can not be disturbed (*Kent v. Manchester*, 29 *Barb.* 595; and see *Stoddard v. Hart*, 23 *N. Y.* 556). The mistake must be one of fact, for mistake in matter of law can not be admitted as a valid excuse, either for doing an act prohibited by law, or for the omission of a duty which it imposes. *Ignorantia juris non excusat*, is the maxim of the common law.

See Chapter V, *ante*, page 34, as to the validity of leases effected by fraud.

II.

Other remedies of the tenant.

Besides the defenses of surrender and of eviction which will be found in subsequent chapters, as well as defenses growing out of the non-performance of the landlord's covenant to repair, which will be found in a chapter devoted to that subject, the tenant has certain other remedies which require consideration.

If the demise be by deed, and the lessor be guilty of the breach of any of the covenants in it upon his part to be performed, the lessee may maintain an action of covenant against him to recover the amount of the damages he, the tenant, may have thereby sustained.

Where a lessee is ousted, either by the lessor himself or another person having title paramount, an action of covenant lies against the lessor. If the lease contain an express covenant for quiet enjoyment, the remedy of the lessee is upon this covenant (*Line v. Stephenson*, 5 *Bing. N. C.* 183); and if the lease contain no express covenant, an action lies against the lessor on the implied covenant in law upon the word "demise" (1 *Saund.* 322a, n. 2). The law implies from this word "demise" in a lease, a covenant upon the part of the landlord, that at the time of the delivery of the lease, he had full power and authority to demise the premises to the lessee for the time and on the terms expressed in the lease (*Fraser v. Skey*, 2 *Chit.* 646). The covenant of quiet enjoyment, does not warrant or protect the tenant against the interruptions of a stranger having no rights (*Dudley v. Folliott*, 3 *T. R.* 584); and AGNEW, J., said in a late case in Pennsylvania (*Improvement Co. v. Schmoele*): "Every lease implies a covenant for quiet enjoyment. But it extends only to the possession, and its breach, like that of the warranty for title, arises only

from eviction by means of title. It does not protect against the entry and ouster of a tortfeasor." Even the entry of the state, by virtue of her right of eminent domain, inturs no breach of the covenant (*Maule v. Ashmead*, 8 *Harris*, 483). The rights of a landlord would be almost worthless if every time a pretender to title brought an ejectment against his tenant, or issued an estrepement to stay alleged waste, he would find his rent suspended, and his remedies gone until the ejectment should be ended. Such an action can not produce this result, until it has its point in actual or virtual eviction. The tenant has a right to call his landlord into his defense, and if eviction follows, as the result of a failure to defend him, he can then refuse payment of the rent, and fall back upon his covenant for quiet enjoyment to recover his damages (*Improvement Co. v. Schmoele*, *supra*).

Tenant's remedy for wrongful entry.

If the landlord, not having any right of entry, enter upon the demised premises during the term, he is just as much liable to an action of trespass at the suit of the tenant, as any stranger would be, but a landlord may enter premises let by him during the term, whenever and so far as it may be necessary to prevent waste, and to save himself from penalties (*Taylor's L. & T.* § 174; *Anderson v. Dickie*, 26 *How.* 105; *S. C.* 1 *Robt.* 238); and it is said that a landlord having the reversion in a house may enter it, after the determination of his tenant's tenancy by a notice to quit or otherwise, either peaceably, or, if no person be in the house at the time, even by breaking open the door, upon the theory that the tenancy being ended, the right of possession reverts to the landlord. But if the tenant holds over, and the landlord breaks in upon him forcibly, so as to endanger a breach of the peace, he is liable to indictment, and although there are authorities which seemingly exempt

the landlord from civil liability for such entry, yet the policy of the law seems to be opposed to such summary and extra-judicial entries, and in *Flaherty v. Andrews* (2 *E. D.S.* 529), the court held, "that although a tenancy had terminated by expiration of the term, or by non-payment of rent, or there has been an agreement to surrender, the landlord has no right to enter by force and put the family and goods of the tenant out of the demised premises, without process." Every unlawful entry upon the premises of another is a trespass, and whether the owner suffer much or little, he is entitled to recover some damages (*Dixon v. Clow*, 24 *Wend.* 188; *Sedgwick on Damages*, 133 *et seq.*; *Parker v. Griswold*, 17 *Conn.* 288; *Blake v. Jerome*, 14 *J. R.* 406); but where the trespass is committed under an honest mistake, without intent to injury, the damages recoverable are confined to compensation for the injury sustained, and do not include exemplary damages (*Shannon v. Burr*, 1 *Hill.* 39).

If the tenant be turned out of possession, or disturbed in his possession of the demised premises by a stranger having no title, the tenant's remedy is by action of ejectment or trespass against the intruder, or by proceedings under the statute for forcibly taking and detaining the possession, if such be the fact, or if he be merely disturbed in the possession by action of trespass or case, according to circumstances. But if he be put out of possession by a stranger having title paramount, the remedy is, as before remarked, against the landlord upon his covenant for quiet possession.

After a tenant was entered upon the demised premises, and is in possession thereof, he may maintain an action of trespass against any person who trespasses upon them, and in fact, may maintain any and all actions necessary for the full protection of his possessory rights and for the redress of any injury thereto, the nature of the remedy and the amount of damages recoverable, however, depending of course upon the nature

of the injury and the character and value of the tenant's possessory title.

III.

Remedies of assignees and representatives.

The statute provides, that "the lessees of any lands, their assigns or personal representatives, shall have the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances, or relating to the title or possession of the premises demised" (1 *Edm. R. S.* p. 698, § 24), and the provisions of this section extend as well to grants or leases in fee, reserving rents as to leases for life and for years (*Id.* § 25), and when an estate is transferred, the remedy is transferred also; if, therefore, the lessor grant his reversion, the remedy follows the reversion to the grantee, and where he assigns it, the remedy will pass to the assignee (*Howland v. Coffin*, 12 *Pick.* 125; *S. C.* 9 *Id.* 52; *Patton v. Deshon*, 1 *Gray*, 325).

IV.

Remedies of joint tenants.

The statute provides that "one joint tenant or tenant in common, and his executors or administrators, may maintain an action of account, or for money had and received, against his co-tenant for receiving more than his just proportion; and the like action may be maintained by them against the executors or administrators of such co-tenant" (1 *Edm. R. S.* p. 701, § 9).

CHAPTER X.

CERTAIN RIGHTS AND DISABILITIES GROWING OUT OF
THE RELATION.

- I. Tenant estopped from disputing landlord's title.
- II. Certain attornments void.
- III. Certain provisons affecting tenant's possession.
- IV. Leases to infants, married women, partners and corporations.

I.

Tenant estopped from disputing landlord's title.

For reasons of public policy, a tenant is never allowed to dispute his landlord's title after having accepted possession under him. This rule is elementary.

The estoppel extends equally to both landlord and tenant, so that where the tenant is estopped from denying the landlord's title, the landlord can not allege that he had no title at the time of the demise.

It is competent, however, for the tenant to show that the title of the landlord, under whom he entered, has terminated either by its original limitation, or by conveyance, or by judgment and operation of law; and this the tenant may show, although he does not claim under that title, and though the title be outstanding in the trustee of the lessor (*Hoag v. Hoag*, 35 *N. Y.* 469). And a tenant who acquires his landlord's title, by a purchase under a judgment subsequent to the demise, may set it up against him (*Nellis v. Lathrop*, 22 *Wend.* 121). And if the lessor's interest is sold, and the lessee attorns to the purchaser, who acquires the title, the lessee may set up the divesting

of the title to defeat the lessor's action for rent accruing thereafter (*Evertson v. Sawyer*, 2 *Wend.* 507; and see also *Lawrence v. Miller*, 1 *Sandf.* 516; *Jackson v. Rowland*, 6 *Wend.* 666).

II.

Certain attornments void.

Attornment, in feudal or old English law, means a turning over, or transfer by a lord, of the services of his tenant to the grantee of his seignory. A transfer by the tenant of his services to the grantee, or new lord; a tenant's consent to a transfer of lands by his lord; or his acknowledgment or acceptance of the grantee as his lord, in place of the former lord. A tenant is said to attorn, where he agrees to become the tenant of the person to whom the reversion has been granted. The attornment of the tenant is unnecessary, however, to the validity of a conveyance by his landlord, and in that respect attornments may be considered as abolished (4 *Kent's Com.* 490, 491). The term, however, continues to be applied to the acts of tenants, in somewhat of its ancient signification.

The statute in regard to attornments provides that "the attornment of a tenant to a stranger shall be absolutely void, and shall not in any wise affect the possession of his landlord, unless it be made,

"1. With the consent of the landlord; or,

"2. Pursuant to, or in consequence of, a judgment at law, or the order or decree of a court of equity; or,

"3. To a mortgagee after the mortgage has become forfeited" (1 *Edm. R. S.* 695, § 3).

The object of the statute is to prevent attornment to strangers or other persons against the will or without any grant from or consent of the landlord.

Certain attornments are, however, recognized and allowed by the statute; thus an attornment to a mortgagee after default is valid (13 *Johns.* 537; 20 *Id.* 51; 3

Wend. 208 ; 3 *Den.* 214 ; but see 2 *Wend.* 507) ; but an attornment to one having no color of title is void (*Jackson v. Delancy*, 13 *Johns.* 537 ; *Jackson v. Sears*, 10 *Id.* 435), and taking a lease from an adverse claimant of title is a fraudulent attornment by the tenant and void (*Jackson v. Harper*, 5 *Wend.* 246) ; and persons entering into possession by the consent, assent or connivance of the tenant becomes tenant (*Bensen v. Bolles*, 8 *Wend.* 125 ; *Jackson v. Miller*, 6 *Id.* 228 ; *Graves v. Porter*, 11 *Barb.* 592 ; *Jackson v. Davis*, 5 *Cow.* 123). The tenant paying his rent to his landlord, can not be prejudiced by any change of title, made by him without notice. The statute has substituted for an attornment, *i. e.* the acknowledgment by the tenant of the new lord, the necessity of giving notice to the tenant before he can be sued by an assignee, for rent accruing after the assignment (*Taylor's L. & T.*, § 442).

III.

Certain provisions affecting tenant's possession.

The statute provides, that "every tenant to whom a declaration in ejectment, or any other process, proceeding or notice of any proceeding, to recover the land occupied by him, or the possession thereof shall be served, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting the value of three years' rent of the premises so occupied by him, which may be sued for and recovered by the landlord or person of whom such tenant holds" (1 *Edm. R. S.* p. 699, § 27), and further provides that "whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy ; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment

of rent ; notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited ” (*Code*, § 86), and the statute relating to highway assessments and deductions therefor, provides that,

“§ 30. Whenever the commissioners of highways shall assess the occupant, for any land not owned by such occupant, they shall distinguish in their assessment lists, the amount charged upon such land, from the personal tax, if any, of the occupant thereof. But when any such land shall be assessed in the name of the occupant, the owner thereof shall not be assessed during the same year to work on the highways on account of the same land.

“§ 31. Whenever any tenant of any land for a less term than twenty-five years, shall be assessed to work on the highways, for such land, pursuant to the last preceding section, and shall actually perform such work, or commute therefor, he shall be entitled to a reduction from the rent due, or to become due from him, for such land, equal to the full amount of such assessment, estimating the same at the rate of sixty-two and a half cents per day ; unless otherwise provided for by covenant or agreement, between such tenant and his landlord” (1 *Edm. R. S.* p. 467).

IV.

Leases to infants, married women, partners and corporations.

Although a demise to an infant may be voidable, it has been settled by authority that an infant who fails to pay his rent, and perform the conditions of the demise, may be removed from the premises by ejectment on the ground of a wrongful possession (*McCoon v. Smith*, 3 *Hill*, 147). When a married woman leases lands, whether for money paid from her separate estate or

upon credit, to the extent of her interest therein, the lands become her separate estate, and she can let them or enter into any contract in reference to them the same as if she were a feme sole (*Prevot v. Lawrence*, 51 *N. Y.* 219), and to the extent and in the matters in which married women are by law permitted to engage, they owe the same duty to those with whom they deal, and may be bound in the same manner as if unmarried (*Bodine v. Killeen*, 53 *N. Y.* 93; *Frecking v. Rolland*, *Id.* 422); and where they clothe others with an apparent authority to act for and bind them, the apparent must be taken for the real authority (*Bodine v. Killeen*, *supra.*)

Partners.

Where a lease for a term of years, made by one of two partners to the firm, for the purposes of the business, is subject to the continuance of the business, and upon a dissolution by the death of either partner, the lease terminates (*Johnson v. Hartshorne*, 52 *N. Y.* 173); and where a lease to a partnership gives a privilege to the lessors of continuing the lease for an additional term upon giving notice of their intention to continue prior to the termination of the original term, in case of the death of one of the partners, the survivor can as such give the required notice, and enforce a fulfillment of the covenants of the lease for the extended term (*Betts v. June*, 51 *N. Y.* 274); and where, during the existence of a continuing partnership of undetermined duration, three or four co-partners, without the knowledge of the other, obtain a new lease in their own name of premises leased and used by the firm, the same becomes partnership property, and upon dissolution the other partner is entitled to his proportion of its value (*Struthers v. Pearce*, 51 *N. Y.* 357); and if there be a specialty as a lease to the partners by name, the retirement, or dissolution, or settlement, will in no way exonerate the retiring partner or any one who is lessee;

nor will anything else which would not operate his discharge if there were no partnership between the lessees. In such a case, notice to the lessor of his retirement would not discharge him, nor would receiving rent by the lessor, from the remaining partners (*Parsons on Part.* 417); and where the bargain between the partners is, that the new comer shall be a partner as of a preceding day, here it is *held* that he is not bound to the creditor, nor a party to the agreement for a debt contracted between that previous day and the actual making of the contract, although he is bound to the partners for his share of the debt, if they pay it (*Saltoun v. Houston*, 1 *Bing.* 433; but see *Schindler v. Euell*, 45 *How. Pr.* 33).

Corporations.

A corporation authorized to dispose of its property may in general dispose of any interest in the same it may deem expedient, having the same power in this respect as an individual (*Reynolds v. Stark County*, 5 *Ohio*, 205), and it may lease its lands (*Featherstonhaugh v. Lee M. P. Co.*, *L. R.* 1 *Eq.* 318), and the technical mode of executing a specialty of a corporation is to conclude the instrument, which should be signed by some officer or agent in the name of the corporation, with, "In testimony whereof, the common seal of said corporation is herenunto affixed;" and then to affix the seal (*Flint v. Clinton Co.*, 12 *N. H.* 433), and to bind a corporation by specialty, it is necessary that its corporate seal should be affixed to the instrument (*Ang. & Ames on Corp.*, § 215). The corporate seal is the only *organ* by which a body politic can oblige itself by *deed*; and though *its* agents affix their *private* seals to a contract binding upon it, yet these not being *seals* as regards the corporation, it is in such case bound only by simple contract (*Id.* § 295), and where a corporation has actually used and occupied land for the purpose of its incorporation

by the permission of the owner, it seems that it is liable to be sued in assumpsit for use and occupation, notwithstanding it has not entered into a contract under its common seal (*Lowe v. London R. R. Co.*, 14 *Eng. L. R. Eq.* 19), and it may be laid down as a rule that the right to engage premises necessary for the carrying on of its business, is a power inherent in every corporation, without which the objects of the corporation could not be accomplished nor its business successfully carried on, and that this power may be exercised by the managing officers or agents of the corporation, as corporations of necessity act only through officers and agents. Whenever a power is given, everything necessary to a complete execution of it is necessarily implied and goes with it.

CHAPTER XI.

OF THE OBLIGATION TO REPAIR.

The landlord sometimes covenants that he will repair the premises. But, unless he bind himself by such express covenant, he is under no obligation to do so. The law imposes an obligation on the lessee to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. He is, therefore, bound to keep the soil in a proper state of cultivation ; to preserve the timber ; and to support and repair the buildings. These duties fall upon him without any express covenant upon his part ; and a breach of them will, in general, render him liable to an action for waste (*Comyn's L. & T.*, 2 ed., p. 188). The obligation of a landlord to repair demised premises rests solely upon express contract, and a covenant to repair will not be implied, nor will an express covenant be enlarged by construction (*Witty v. Mathers*, 52 *N. Y.* 512).

In *Eagle v. Swayze* (2 *Daly*, 140), it was held that a tenant from year to year, renting *part* of a dwelling-house, the residue of which is occupied by other tenants, is under no obligation to make repairs of so general, substantial, and lasting a nature, as the rebuilding of a chimney which has fallen down (see also *Johnson v. Dixon*, 1 *Daly*, 178). A tenant can not, without special agreement, make repairs at the expense of his landlord (*Munford v. Brown*, 6 *Cow.* 475 ; *McCarty v. Ely*, 4 *E. D. S.* 375) ; but the tenant, may, when his landlord is bound to repair, and repairs are needed, make the repairs himself, after due notice to the landlord, and waiting a reasonable time, and may recover the expense thereof from the landlord ; or he may, at his

own option, leave the premises unrepaired, and recover from the landlord the damage sustained by him (*Myers v. Burns*, 35 *N. Y.* 269; aff'd 33 *Barb.* 401; *Cook v. Soule*, 56 *N. Y.* 420). In the case last cited the court held that where the lease is for a year, the fact that the lessee has paid the rent except for the last quarter does not deprive him of the right to counter-claim his damages for the entire year, and if in excess of the rent, he is entitled to a verdict for the excess, and that the lessee's measure of damage is the difference in value of the use of the premises as they are and as the lessor agreed to put them; a promise by a landlord to repair, made after the delivery and acceptance of the lease, requires a new consideration to render it binding (*Walker v. Gilbert*, 2 *Robt.* 214; *Doupe v. Genin*, 37 *How. Pr.* 5; aff'd in 45 *N. Y.* 119; *Flynn v. Hatton*, 43 *How.* 333; and see 1 *E. D. S.* 253; 2 *Id.* 248); and where a lease is in writing, parol evidence can not be given that the landlord at the time of executing it, promised to repair (*Cleves v. Willoughby*, 7 *Hill*, 83; *Abb. Dig.* vol. 2, p. 661); and a landlord is under no obligation to the tenant to protect his premises from adjoining excavations (*Sherwood v. Leaman*, 2 *Bosw.* 127; *Howard v. Doolittle*, 3 *Duer.* 464; *White v. Meolio*, 37 *N. Y. Sup'r Ct.* 72); and in the contract of letting there is no implied warranty that the premises are tenantable (*Mayer v. Moller*, 1 *Hill.* 491; 7 *Hill*, 86; 2 *E. D. S.* 248; 1 *Daly*, 481); for the maxim of *caveat emptor* applies, that if a building is injured by fire, the landlord can not be compelled to re-build or repair it for the benefit of his tenants, unless he has expressly covenanted to do so, applies as well to a case where a tenant has hired a part of the building, *e. g.*, a basement-room, and the injury by the fire is confined to the roof. The landlord is not liable for injuries consequent upon his delay to repair the part destroyed (*Doupe v. Genin*, 45 *N. Y.* 119).

For liability for injuries to third persons, *vide* that title.

Under covenant to repair.

Under a covenant to “keep” in repair, if to keep in repair, it is necessary that the rooms should first be put in repair, the covenantor is bound to perform that duty (*Myers v. Briggs*, 35 *N. Y.* at pp. 271, 272; *Ward v. Kelsey*, 38 *Id.* 80; *Payne v. Haine*, 16 *M. & W.* 541). And where the agreement stated was, to leave the premises in the same state in which they were at the commencement of the tenancy, and the written agreement given in evidence, was to leave them in the state they then were,—the premises being then in the possession of another tenant, and the defendant’s tenancy was not to commence for a month afterwards, yet the court held it to be sufficient (*White v. Nicholson*, 4 *Man. & Gr.* 95). Where there was an agreement between the plaintiff and the defendant, the plaintiff to let, and the defendant to take a house for three years, from December 25, 1839, at the yearly rent of thirty pounds, payable quarterly, and the defendant (amongst other things), thereby, agreed to keep the premises in as good repair and condition as the same then were, and to leave them so on the determination of the tenancy, fair wear and tear excepted; the tenant, however, quitted the premises in September 29, 1841;—in an action of assumpsit upon the agreement for two quarters rent due March 25, 1842, the defendant pleaded that the house by reason of the badness of the materials with which it was built, &c., and by and through the neglect and default of the plaintiff, and not for want of any such repair as the defendant was bound to do under the agreement, became so ruinous, unsafe and unfit for habitation, that he was obliged to quit it before the rent in question began to accrue; this was traversed by the replication, which also alleged that the premises became in the state mentioned in the plea, for want of the repairs the defendant was bound to do by the agree-

ment, and by and through the default of the defendant. At the trial the defendant proved that by reason of the house being built in a marsh, and upon a bad foundation, the walls had sunk, and there were large gaps in them, so that they were obliged to be shored up, and the basement was so full of water, that pumping for several hours a day became necessary, and even then it was so wet, as to be utterly unfit for habitation; the jury having given a verdict for the defendant, the court upon application granted a new trial; they held that the plea and the proof of it, were no reasons why the tenant should not pay the rent during the term; he might have examined the house before he took it; and his not having done so, or not having done so effectually, was his own fault; and as to the landlord, he was under no agreement, express or implied, to make any repairs, nor had he expressly or impliedly warranted the house to stand during the term (*Arden v. Pullen*, 10 *Mees. & W.* 321).

So, where a wharf was leased, and before entry of the tenant, a large portion of it was destroyed by natural decay, of which the lessee gave notice to the landlord, requesting him to repair; but he neglected to do it, and the lessee then refused to enter or pay rent; *held*, that he was still liable for the rent (*Hill v. Woodman*, 2 *Shep.* (14 *Maine*) 38; *Cleves v. Willoughby*, 7 *Hill*, 83); and where there is no stipulation upon the subject, a person who agrees to take a house must take it as it stands, and can not compell the lessor to put it into a condition fit for habitation (*Chappell v. Gregory*, 34 *Beav.* 250).

The extent of the repairs, however, are to be measured by the age and class of the buildings; and a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one. The expression "good repair" is to be received with like qualification (*Hart v. Winsdor*, 12 *M. & W.* 77; *Mantz v. Goring*, 4 *Bing. N. C.* 451; 33 *E. C. L. R.* 409;

Payne v. Haine, 16 *M. & W.* 541; *Burdett v. Withers*, 7 *A. & E.* 136). In an action for rent, the defendant may, under a covenant of the landlord to keep the premises in repair, set up, as a counterclaim, an amount expended by him in the necessary repair of the premises, and also damages sustained by the loss of the use of certain parts of the premises rendered untenable for want of repair, and in such an action the defendant may recover for his expenses in repairs, even when they exceeded what it would have cost the landlord, had he employed his own mechanics.

In the leasing of premises for a first class hotel, a covenant to keep the same in repair is broken by permitting the flues to remain in such condition that the rooms can not be used with a fire, owing to the issuing of smoke from the grate in the room, whenever a fire is lighted therein (*Myers v. Bowers*, 35 *N. Y.* 269). The breaking of a door-way through the wall of a demised house into an adjoining house, and keeping it open for a long space of time, amounts to a breach of covenant to repair) *Doe d. Vickery v. Jackson*, 2 *Stark.* 293; and see 2 *F. & F.* 111, 115; 6 *C. & P.* 195).

A tenant to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, can not remove a veranda erected by himself, which is affixed to the ground by means of posts (*Penry v. Brown*, 2 *Stark. N. P. C.* 403), and a tenant covenanting to repair is liable to a penalty incurred by want of them (*Mayor v. Corliers*, 2 *Sandf.* 301). Under a covenant to substantially repair, uphold, and maintain a house, the tenant is not bound to keep up the inside painting (*Mark v. Noyes*, 1 *C. & P.* 265), nor is a tenant under covenant to repair liable for the extra expense of laying a new floor on an improved plan (*Soward v. Leggatt*, 7 *C. & P.* 613), and the term habitable repair means a state of repair reasonably fit

for the occupation of an inhabitant (*Belcher v. McIntosh*, 8 *C. & P.* 720).

Right of action for breach,

Under the tenant's covenant to keep the premises in repair, and lease the same in such condition, the landlord need not wait till the expiration of the term, before suing for suffering to get out of repair (*Webster v. Nosser*, 2 *Daly*, 186 ; *Schiefflin v. Carpenter*, 15 *Wend.* 400, and cases cited).

Extent of landlord's liability.

It has been held in the Common Pleas, that the measure of damages, in an action against a landlord for not repairing, is the amount it would cost to make such repairs, and for the reason that the tenant can not, by exposing himself, his family, or his goods to the injuries or damage which result from the landlord's negligence, present a meritorious claim, when he could remedy the evil by repairs for which he would be fully indemnified (*Walker v. Swayzee*, 3 *Abb. Pr.* 138) ; when a building is unfit for the use contemplated, if the tenant has a remedy for such unfitness, he must seek it either by charging the landlord with the expense of remedying the defects, or by refusing to use the premises, and thereby exonerate himself from liability under the contract of hiring. But a tenant has no right to use demised premises, which he knows to be unfit for occupation, in such a way as to cause damage and loss, and then seek to recover from his landlord for the damages so occasioned by his own acts. This was held by the N. Y. Common Pleas some years since, in *Nichol v. Dusenbury*, where the tenant, knowing that the roof of a house he had hired was unfinished, and permitted the rain to come through, instead of repairing the roof, placed his goods in the store, which were there damaged by the rain—the court held that under these circumstances the tenant could not recover. The

rule is the same whether the damage is produced by water on goods or by exposure to cold, either in property or person (*Academy of Music v. Hackett*, 2 *Hill.* at p. 223, citing the above). A lessee knowing that his property if left upon premises will be exposed to injuries from storms, or otherwise endangered by a failure of the lessor to repair, has no right to take the hazard; and if he does, and his property is injured, he can not recover of his lessor therefor (*Cook v. Soule*, 56 *N. Y.* 420); and a simple covenant to repair in no way contemplates any destruction of life or casualties to the person or property of any one, which may accidentally result from an omission to fulfill the agreement in any respect (*Flynn v. Hatton*, 43 *How.* 333). If premises are in good repair when demised, but afterward became ruinous and dangerous, the landlord is not responsible therefor either to the occupant or the public during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself; and this rule applies to a lessee out of possession who has sublet to another who is in possession (*Clancy v. Byrne*, 56 *N. Y.* 129), and the lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises, for their condition, or that they are tenantable, and may be safely and conveniently used for the purposes for which they are apparently intended (*Jaffe v. Harteau*, 56 *N. Y.* 398).

(See chapter upon Liability for Injuries to Third Persons, *post.*)

CHAPTER XII.

COVENANTS RUNNING WITH THE LAND.

A covenant is said to run with the land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the reversion.

Questions upon this branch of the law, generally arise between the lessor of lands or his assignee upon the one side, and the lessee thereof or his assignee upon the other.

The leading case upon the subject (Spencer's) will be found discussed in *Smith's Leading Cases* (vol. 1, *marg.* p. 22), where all the authorities upon the subject are collated; and further reference will be made only to a few of the general principles which characterize the rule, in its application to particular cases.

The rule applies to all contracts of lease or demise, except where the common law has been changed by statute. The assignee of the lessee is in privity of estate with the owner of the reversion, and is said to be liable by reason of that privity. He is not liable by the same rule which binds him to fulfill his own agreements, because he is not in privity of contract, for he was not a party to the making of the contract, and his liability attaches, therefore, upon another ground: *e. g.*, his privity of estate.

The lessee continues liable upon the express covenants in the lease by virtue of the privity of contract, notwithstanding any assignment he may make, and notwithstanding the assignee's liability; by reason of

the privity of estate, the lessee's liability, in respect to covenants which run with the land, rests both upon the privity of contract and of estate; of the first he can not divest himself by assignment. Covenant for rent, therefore, may always be maintained against the lessee or his representatives, although he may have assigned his term, and although the lessor or his grantee may have accepted rent of the assignee (*Walton v. Cronly*, 14 *Wend.* 64; *Auriol v. Mills*, 4 *T.R.* 98; *Post v. Jackson*, 17 *Johns.* 239, *aff'd Id.* 479; *Damb v. Hoffman*, 3 *E. D. S.* 361; *House v. Burr*, 24 *Barb.* 525).

Sugden, in his work on *Vendors* (note to marg. p. 582: 8th Am. Ed.), explains the phrase "privity of estate and of contract" as follows: "There are three manner of privities, viz.: 1. Privity in case of estate only; 2. Privity in respect of contract only; 3. Privity in respect of estate and contract together. The first, viz., Privity of estate only, as between the grantee of the lessor's reversion and the lessee, or between the lessor and the assignee of the lessee, for no contract was made between them. The second, viz., Privity in respect of contract only, which is personal privity, and extends only to the person of the lessor and the person of the lessee, as between the lessor and the lessee, *after* the latter has assigned over, for the privity of contract remains, although the privity of estate is destroyed; and yet this is between the lessor and lessee only, for in the very case, viz., an assignment by the lessee, there is no privity of contract between the lessor and the assignee, but there is a privity of estate between them. The third, viz., Privity in respect of contract and estate together, as between the lessor and the lessee himself."

It is said, however, that there are only two kinds of privity, namely, privity of contract and privity of estate. That the third privity is constituted by the joining of both between the same parties. Privity of contract is not assignable, but remains between the lessor

and the lessee, after the privity of estate is transferred, to exist between other parties. In stating that the privity of contract remains, it is meant only that the lessee would remain liable upon his personal covenant after he had assigned the estate.

There is no doubt but that the rule of law which makes covenants run with the land as a burden, applies to all leases of lands, except where the statute has provided against such application. So far there seems to be a uniform concurrence of all the authorities. It should, however, be borne in mind that the covenant in such case binds only the assignee, and does not reach persons in possession as under-tenants, or those who have acquired an interest in any way except by assignment. The under-lessee or under-tenant holds under another contract, and is not, therefore, in privity of estate under the first lease. It has been a doctrine settled ever since the decision of *Halford v. Hatch* (1 *Douglass* 183,) that a landlord can not maintain an action of covenant for rent against an under-tenant.

Upon the same principle it was held in *Quackenboss v. Clarke* (12 *Wend.*, 555), that the defendant was not liable upon a lease for years because no assignment had been made to him, although he was in possession and had purchased the rights of the lessee, had received from him the lease, and had declared himself owner of the premises. The court remarked, that "as the liability of the assignee rests upon his estate, it is clear that when it is shown that no estate is vested in the defendant, it follows that he is not liable as assignee."

The following covenants may be said to run with the land, viz.: the covenant against nuisances, to pay rent, to pay taxes and assessments, to repair, and in short any covenant which extends to a thing *in esse*, parcel of the demise and thing to be done by force of the covenant is annexed to and appurtenant to the thing demised, and goes with the land, and binds the assignee, although not named; but when the covenant extends to a thing which

is not in being at the time the demise is made, it can not be appurtenant or annexed to the thing which hath no being. In *Cole v. Hughes* (54 N. Y. 444), the Court of Appeals held that the benefit of a covenant will pass with the land to which it is incident, but that the burden or liability is confined to the original covenantor, unless a privity of estate between him and the covenantee exists, or is created at the time the covenant is made, and that where an owner of land builds a party wall under an agreement with the adjoining owner that when the latter shall use it, he will pay the expense of his portion of the wall, that the right to compensation is personal to the builder, and does not pass by a grant of his land, and that the agreement does not run with the land of the adjoining owner so as to bind his subsequent grantees, and that this is so, although the adjoining owner, by the terms of his agreement, assumes to bind his grantees, and although one purchases of him with notice of the agreement. The Commission of Appeals in *Brown v. McKee* (57 N. Y. 684), hold that the criterion for determining whether a covenant runs with the land is the intention of the parties, provided the covenant be of such a nature that it can, under any circumstances, bind the land in respect to grantees, and that where covenants are of a nature that they can run with the land, they bind, not only the original parties, but the subsequent owners of the respective premises, and that as affecting assignees, there is no distinction between the benefit and the burden of a covenant; and that both will pass alike as an incident to an estate in lands, and both will run with an incorporeal, as well as with a corporeal hereditament.

CHAPTER XIII.

SURRENDER.

A surrender is defined to be a yielding up of an estate for life or years to him who hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them (*Comyn's L. & T.*, 2d ed., 336); a surrender is either in fact, by express words, clearly manifesting the intention of the lessee to yield up his interest, or by act and operation of law, when the parties without any express surrender do some act which implies that they have both agreed to consider the surrender as made (*Id.*). By statute it is enacted that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing" (2 *Edm. R. S.*, 139, § 6).

This statute has been held to relate only to the estate intended to be surrendered, and not to the terms of the instrument by which it is created, and that an unexpired term of one year in a lease originally for three years may be surrendered by parol (*Smith v. Devlin*, 23 *N. Y.* 363).

The surrender of a lease, though with an agreement that the lessee should remain liable for the rent, and that the landlord might take all lawful measures for its collection, terminates the relation of landlord and

tenant (*Bain v. Clark*, 10 *Johns.* 424; *Shepard v. Merrill*, 2 *Johns. Ch.* 276); the surrender of the remainder of the term does not discharge the lessee from the payment of the rent already due (*Sperry v. Miller*, 8 *N. Y.* 326; *Curtis v. Miller*, 17 *Barb.* 477), though payable in advance (*Learned v. Ryder*, 61 *Barb.* 552; *S. C.*, 5 *Lans.* 539). Neither can a landlord, where rent is expressly reserved, payable at stated periods, recover a proportionable part of the rent for the occupation of his premises for any time short of such periods. Therefore, where A demised to B the first and second floors of a house for a year, at a rent payable quarterly; and during a current quarter some dispute arising between the parties, B told A that she would quit immediately; and A answered, she might go when she pleased, and B quitted, and A accepted possession of the apartments, it was held, that A could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter, nor rent *pro rata* for the actual occupation of the premises for any period short of the quarter (*Grimman v. Legge*, 8 *B. & C.* 324; *Whitehead v. Clifford*, 5 *Taunt.* 518); and where under the usual provision that, if the premises became vacant, the landlord might relet and charge the tenant with the deficiency, and the tenant gave notice of his inability to continue to pay rent, and the landlord thereupon consented to a reletting, it was held not a surrender, and that the original lessee was still liable for the deficiency (*Ogden v. Rowe*, 3 *E. D. S.* 312); and where the lessee covenants that if the lessor shall re-enter during the term for condition broken, and shall be unable to relet the premises for a sum equal to the amount of the rent reserved, that he will pay the lessor the deficiency, and the lessor re-enters and relets the premises for the residue of the term, the covenant is valid and binding upon the tenant, but the landlord can only recover of the lessee the difference between the amount of the rent reserved by the original

lease and the amount of all the rent realized during the term from the original lessee and the tenant to whom the premises were relet; and when the lessor, after a re entry and a reletting of the premises, under such condition, brings an action upon such covenant before the rent reserved from the tenant to whom he relet is due, he can only recover the deficiency which exists, after allowing the amount of the rent towards the rent reserved from the original lessee. Nor is such lessor entitled to any allowance, as against the original lessee, for expenditures made upon the premises after the re-entry, although thereby he was enabled to and did obtain more rent for the residue of the term, from the tenant to whom he relet the premises (*Hackett v. Richards*, 13 *N. Y.* 133; *Hall v. Gould*, *Id.* 127). Where a tenant before the expiration of his term informs his landlord that the premises are not fit to live in, and that he will surrender them and have nothing farther to do with them, and pays up the rent to that time, and the landlord tells him that he will let the premises on his account, and hold him responsible for the rent, held, no evidence of a surrender, although the landlord afterwards let the premises to a new tenant, and received rent of him (*Bloomer v. Merrill*, 29 *How.* 259; 1 *Daly* 485). Proof of an oral declaration by a landlord, that on payment of rent to a particular day he would release the tenant from further liability accompanied by proof of payment of such rent, is not sufficient evidence of the surrender of premises held under a written lease (*Goelet v. Ross*, 15 *Abb. Pr.* 251).

Where a tenant informed his landlord of his intention to remove from the demised premises on a certain day, and the latter thereupon said he was sorry, for then he must get some other person to hire the premises; and the landlord also gave the tenant permission to leave some of his property on the premises after such day; held, that giving such permission is evidence from which an acceptance of a surrender of the premises

could be presumed, and if so presumed no rent could accrue thereafter (*Stanley v. Koehler*, 1 *Hilt.* 354). A lessor who has consented to a change of tenancy and of occupation, and received rent from the new tenant as an original and not as a sub-tenant, can not afterwards charge the original tenant for rent accruing during the occupation of the new tenant (*Smith v. Niven*, 2 *Barb.* 180). After a lessee had underlet the whole of the demised premises, by two written sub-leases, the landlord called on the under-tenants, produced the sub-leases, demanded of them the rent reserved, forbade their paying any more rent to the original lessee, said he was the rightful landlord, and had taken the place off the lessee's hands, and afterwards collected all the rent which was ever collected of the sub-tenants, and held that there was a surrender of the original lease by operation of law (*Bailey v. Delaplaine*, 1 *Sandf.* 5); and the mere acceptance by the landlord of the key of the demised premises, from a tenant who quits possession during the term, is not an acceptance of the surrender, where the landlord states that he receives the key but not the premises (*Townsend v. Albers*, 3 *E. D. S.* 560). Where the landlord and tenant from year to year had agreed that another tenant should be substituted, which substitution was accordingly made, *HOLROYD, J.*, held that this agreement operated as a surrender in law, and that consequently no surrender in writing was necessary (*Stone v. Whiting*, 2 *Stark.* 235); but a tenancy from year to year created by parol, is not determinable by a parol license from the landlord to the tenant to quit in the middle of a quarter, followed by the tenant's quitting the premises accordingly, the statute requires that such a surrender should be by deed or note in writing, or by operation of law (*Mollett v. Brayne*, 2 *Camp.* 103); but where the lessee underlet, and the lessor accepted the under-lessee as tenant, which acceptance was afterwards assented to by the original lessee, the Court of King's Bench held that this amounted to

a virtual surrender of the lessee's interest by act and operation of law (*Thomas v. Cook*, 2 *B. & Ald.* 119). In *Murray v. Shave* (2 *Duer*, 183), the tenant requested to be allowed to give up her lease, and the landlord accepted the key and thereupon entered into a new agreement with another person, this was held a virtual acceptance of the landlord of the tenant's offered surrender, and discharged her from her liability on the lease. In *Randell v. Rich* (11 *Mass.* 494), it was held that a lease under seal was determined by the delivery of the key to the lessor, accompanied by his receipt of it, and putting another tenant in possession. In *Talbot v. Whipple* (14 *Allen*, 177), BIGELOW, C. J., said, "The rule of law as now settled by the recently adjudicated cases is, that any acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession of the demised premises, amount to a surrender by operation of law." If a landlord relets the premises, without notice to the tenant that it is on his account, it dispenses with a formal surrender on the part of the tenant (*Watts v. Atcheson*, 3 *Bing.* 462; *Peter v. Kendal*, 6 *B. & C.* 703); and after an original landlord has recognized under-tenants as his tenants and as the persons responsible to him for the rent, he can not hold the assignors of such sub-tenants (*Carter v. Hammett*, 18 *Barb.* 608).

§ Agent's power to accept surrender.

An agent employed to let premises and collect the rents has no authority to consent to the substitution of a new tenant, and the discharge of the original lessee; that not being within the ordinary scope of such an agent's authority (*Wilson v. Lester*, 64 *Barb.* 431).

Accepting new lease.

The statute provides that "if any lease be surrendered in order to be renewed, and a new lease be made

by the chief landlord, such new lease shall be good and valid to all intents and purposes, without a surrender of all or any of the under-leases derived out of such original lease so surrendered ; and the chief landlord, his lessee, and the holders of such under-leases, shall enjoy all their rights and interests, in the same manner and to the same extent, as if the original lease had been still continued ; and the chief landlord shall have the same remedy by entry upon the demised premises for the rents and duties secured by such new lease, so far as the same do not exceed the rents and duties reserved in the original lease so surrendered. (1 *Edm. R. S.* 695, § 2) ; and an acceptance by the tenant of a new lease of the same premises, during the period of the first lease, will be deemed to be a virtual surrender of the former lease. It admits the capacity of the lessor to make such a lease, which he would not have without a surrender of the first lease, and the presumption of law is, that such lease has been surrendered ; for no man would take from another a lease of premises, of which he has already the legal control, and agree to pay him rent for it (*Coleman v. Maberly*, 3 *T. B. Monr.* 220 ; *Jackson v. Gardner*, 8 *Johns.* 394 ; *Roe v. Archbishop of York*, 6 *East*, 86, 90, 101 ; *Abeil v. Williams*, 3 *Daly*, 17).

CHAPTER XIV.

EVICTION.

To be maintained in the peaceable and quiet enjoyment of the property demised to him, is the right of every tenant, but the obligation on the part of the landlord to protect his tenant in the possession and quiet enjoyment of the premises demised extends only to evictions and disturbances caused by himself, or by some one with title paramount, and the covenant of quiet enjoyment expressed or implied in a lease, only goes, therefore, to the extent of engaging that the landlord has a good title, and can give a free unincumbered lease of the premises demised, and the acts of strangers, not claiming under any title, can not in any sense be regarded as a breach of such covenant on the part of the lessor (*Weeks v. Bowerman*, 1 *Daly*, 100; *Johnson v. Oppenheim*, 34 *N. Y. Superior Court R.* 416, 428, affirmed in 55 *N. Y.* p. 280; 3 *Duer*. 464; 3 *Hill*, 330; *Taylor's L. & T.* § 305); and to work a suspension of the obligations of the tenant, under the lease, while his rights under it remain in full force, there must be an exclusion of the occupant from some portion of the premises demised, or a substantial and effectual deprivation of the beneficial enjoyment of the property in whole or in part (*Edgerton v. Page*, 20 *N. Y.* 281, 284; *Lounsberry v. Snyder*, 31 *Id.* 514). The following authorities illustrate the application of these general principles to stated cases.

In *Cohen v. Dupont* (1 *Sandf.* 260; *S. P. Dyett v. Pendleton*, 8 *Cow.* 727), it was held that it was not necessary that there should be a physical eviction or expulsion of the tenant by the landlord, to operate as a suspension of the tenant's liability to pay rent, and

that it is sufficient that there was an interference with or disturbance of the beneficial enjoyment of the demised premises, intentionally committed by the landlord, and injurious in its character.

In *Cohen v. Dupont* (*supra*) it appeared that the defendant's principal, Dr. Chase, occupying the second floor of the house, had reserved to himself in the lease, the privilege of exercising his vocation as a dentist. His business necessarily would lead to many visits to his apartments, and to the more in proportion to his prosperity.

It seems that the calls made upon him, were in fact numerous ; and either because they were disturbed by the constant ringing of the door-bell, or from a mischievous or malicious motive, some of the plaintiff's family resorted to the expediency of muffling the bell. This was done frequently, and was continued, after the tenant remonstrated with the plaintiff against it, and after the latter, by exercise of his authority, should have stopped it effectually. The consequence of this conduct was, that persons coming to visit the tenant as a dentist, would pull at the bell, and wait from fifteen to twenty minutes and half an hour, before effecting an entrance, and sometimes were compelled to leave without succeeding in getting into the house, and if persisted in, the inevitable effect of such conduct would be seriously to impair, if not to destroy, the tenant's professional business. In addition to this, and calculated to affect the tenant in the same way, there were a variety of minor offenses committed by the plaintiff's family. They littered the stair-carpet with nut-shells, dirt, and other filth, with the sweepings from the story above, and with water spilled upon it, and placed snow balls in the window-sill, &c., to drip upon the carpet. On one occasion, a placard was put on the stairway to call attention, by his name, to the filthy condition of the tenant's stairs ; such condition being in spite of great efforts on his part to keep it clean.

Impertinent and insulting language was addressed by the plaintiff's family to persons visiting the tenant on business ; and loud singing and like noises were made on the stairway, calculated to disturb such persons. Such being the evidence, the jury held that it proved an eviction of the tenant, and the court held that the conclusion was correct.

In *Dyett v. Pendleton* (8 *Cow.* 727), it was held to be a good defense against a claim for rent, that the lessor was in the habit of bringing lewd women under the same roof with the house leased, though in an apartment not let, by which noise and disturbance was made, so that the lessee left the house with his family.

In *Rogers v. Ostrom* (35 *Barb.* 523), it was held that tearing down a partition which separated the entrance to the tenant's room from a grog shop, so as to compel him to pass through the latter, in order to reach his own room, amounts to an eviction.

In *Smith v. Marrable* (1 *Carr. & Marshm.*, 479), which was an action of assumpsit for the use and occupation of a furnished house, the defendant took possession, but quit at the end of four days because the beds, mattresses, and bedsteads were infested by bugs. A week's rent was tendered by him, but the action was prosecuted to recover for the residue of the term, which was four weeks. Lord ABINGER, C. B., before whom the cause was tried, charged the jury that "every person who undertakes to let a ready furnished house or apartment is bound to take care that the premises are free from nuisances ;" and he left it to the jury to decide whether this house was in that condition. The jury found for the defendant, and on a motion for a new trial the court agreed that the charge was right. In *Salisbury v. Marshal* (1 *Carr. & Payne*, 65), the premises became ruinous before the expiration of the tenant's term, and he abandoned them. At the commencement the landlord said he would put them in good repair, and something had been done for that purpose.

In an action for use and occupation, Chief Justice TINDAL laid some stress on the peculiar words of the lease, and told the jury that they must determine "whether the premises were put into such a reasonable and decent state of repair, as that a decent family might be supposed to occupy them during that time;" "whether such repair had been made at the time when the defendant was to go in, as that they could be reasonably expected to continue during the tenancy, and give the tenant the decent enjoyment of the premises." The jury found for the defendant.

In *Gilhooley v. Washington* (3 *Sandf.* 330, affirmed in Court of Appeals, 4 *N. Y.* 217), it was held that if a landlord lets a part of a house to one tenant, and then a part of the same house to another, and the one tenant makes his part a disorderly house and a nuisance, so as to render the other portion no longer habitable, the lease to the latter is not thereby determined, nor is he excused from the payment of rent. The doctrine of eviction by a nuisance can not be applied where the landlord lets a part of his tenement in good faith, and is not instrumental in producing the nuisance. Nor is it peculiarly the landlord's duty to initiate proceedings against the disorderly tenant for a misdemeanor. (See *Townsend v. Gilsey*, 7 *Abb. N. S.* 59; and see also title, "Fraud in the Leasing of Premises," *ante*, p. 34).

In *Randell v. Alburdis* (1 *Hill.* 285) it was held, that the refusal by a landlord occupying premises in conjunction with his tenant, to permit an under-tenant to occupy the premises demised, constituted an eviction. In *Christopher v. Austin* (11 *N. Y.* 216), it was held that an eviction from part of the demised premises, operates as a suspension of the whole rent.

In *Ogilvie v. Hull* (5 *Hill.* 52) it appeared that the landlord, a year and more before the expiration of the lease, wilfully undertook to let the premises, and posted a bill on the building, but desisted before the commencement

of the last year, and it was held that this was not a constructive eviction.

In *Campbell v. Shields* (11 *How. Pr.* 565), it was held that the landlord altering the wall of the house so as to make the rooms somewhat narrower, in compliance with a claim of an adjoining owner that the true boundary required it, the tenant remaining in possession was not an eviction.

In *Cowie v. Goodwin* (9 *Carr. & Payne*, 378), it was shown that the wall of the house gave way, whereby the kitchen was filled with filth and rendered useless. The tenant quit in consequence of this state of the premises, and an action for use and occupation was brought against him. Lord DENMAN asked the jury "whether these premises were unfit for proper and comfortable occupation, and if the defendant *bona fide* quitted the apartments as soon as he could procure others." The jury answered both questions in the affirmative, and the plaintiff elected to be non-suited.

In *Vatel v. Herner* (1 *Hill*. 149), it was held that an interference by the landlord with the person of the tenant, although on the demised premises, does not constitute an eviction; and that the use of a privy by a landlord in a passage-way leading to the demised premises, and which was there at the time of the hiring, although so used as to be offensive to the tenant, does not of itself constitute an eviction; the tenant not being actually deprived of any part of his premises.

In *Ogden v. Sanderson* (3 *E. D. S.* 166), it was held that where the tenant is present at a negotiation to relet the premises to a third person, and does not object, but proposes a surrender on his own part, a possession by such third person should not be considered an eviction.

In *Vanderpoel v. Smith* (1 *Daly*, 311) it was held that the landlord continuing possession of a small part of demised premises for a very brief period after the expiration of the time fixed by the lease for his giving

possession of it, without any intent to keep the tenant out of possession is not an eviction.

In *Lounsberry v. Snyder* (31 *N. Y.* 514), it was held that where the landlord piled fire-wood on a part of the demised lands, which did not interfere with the substantial enjoyment of the premises, did not amount to an eviction but a trespass, and that to suspend the obligations of the tenant, under the lease, while his rights under it remain, there must be an exclusion from some part of the premises, or a substantial and effectual deprivation of the beneficial enjoyment of the property, in whole or in part.

In *Edgerton v. Page* (20 *N. Y.* 281 ; *S. P. Academy of Music v. Hackett*, 2 *Hill.* 217), it was held that a tenant who has continued to occupy the whole of the demised premises during the whole period for which rent is claimed, is not released from payment of such rent by the landlord's acts of neglect diminishing the beneficial enjoyment of the premises during the period for which the rent is sought to be recovered. While the tenant remains in possession of the entire premises his obligation to pay rent continues ; though it is otherwise if he is compelled to abandon possession before the rent falls due.

If while a tenant is in possession of premises, the landlord enters and uses any part of them, he thereby deprives himself of his claim to rent (*Griffith v. Hodges*, 1 *C. & P.* 419, 420) ; so also if after a tenant has left a house unoccupied, the landlord enters and is in profitable occupation of the house, he can not recover rent from the tenant after such occupation ; but this result will not be produced by merely putting a person into the house to take care of it and prevent depredations (*Bird v. Defonvielle*, 2 *C. & K.* 415). The landlord of apartments deserted by the tenant may recover rent, although he has put up a bill in the window for the purpose of letting them (*Redpath v. Roberts*, 3 *Esp.* 225), or has lighted fires in the rooms and made some

use of such fires (*Griffith v. Hodges, supra*); and the landlord who relets deserted premises should give notice to the former tenant that he lets the premises solely on such tenant's account (*Walls v. Atcheson, 3 Bing. 462*), and a tenant who has been evicted from part of the demised premises does not, by the mere fact of demanding of his landlord a sum by way of rent for premises from which he has been evicted, waive his right of action for damages for the eviction (*Drucker v. Simon, 4 Daly, 53*).

In *Johnson v. Oppenheim (34 N. Y. Superior Court R. 416; aff'd 55 N. Y. 280; S. P. White v. Mealis, 37 N. Y. Superior Court R. 72; 3 Duer. 464; 2 Bosw. 127)*, it was held the acts of strangers erecting a building on an adjoining lot do not amount to an eviction, and that the landlord was not answerable for such acts; and a landlord owning a lot adjoining premises demised may build on such lot, notwithstanding the building cuts light and air from the premises demised. Such an act on the part of the landlord is not an eviction (*Palmer v. Wetmore, 2 Sandf. 316; 9 N. Y. Leg. Obs. 173; 10 Barb. 537*), and the undermining the tenant's wall, by an adjoining owner, is no excuse for the non payment of rent (*Kramer v. Cook, 7 Gray, 550; 37 N. Y. Sup'r Ct. 72; 3 Duer. 464; 2 Bosw. 127*).

Effect of eviction.

An eviction from part of the demised premises by the wrongful act of the landlord operates as a suspension of the whole rent (*Christopher v. Austin, 11 N. Y. 216*), but if the eviction be by title paramount, the rent is to be apportioned (*Blair v. Claxton, 18 N. Y. 529; Lansing v. Van Alstyne, 2 Wend. 561, 563*).

Eminent domain.

The act of appropriating property under the right of eminent domain, is not an eviction which will bar a suit for rent (*Folts v. Hautley, 7 Wend. 210; see Gillilan v. Spratt, 3 Daly, 440*).

What the eviction affects.

The eviction does not affect arrears of rent, but that accruing afterwards (*McKeon v. Whitney*, 3 *Den.* 452; *Giles v. Comstock*, 4 *N. Y.* 270), and the rule is the same although the rent is payable in advance, and the eviction occurs before the expiration of the period in respect to which the rent is claimed (*Id.* *Whitney v. Meyers*, 1 *Duer.* 266), and the eviction only suspends the rent during the continuance of the eviction (*Ogden v. Sanderson*, 3 *E. D. S.* 166).

CHAPTER XV.

THE STATUTE RELATING TO UNTENANTABLE PREMISES.

LAWS 1860, CHAPTER 345.

An Act in relation to the Rights and Liabilities of Owners and Lessors, and of Lessees and Occupants of Buildings.

Passed April 13, 1860.

The People of the State of New York, represented in Senate Assembly, do enact as follows:

Section 1. The lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied.

Sec. 3.* This act shall take effect immediately.

Construction of said act.

The act does not apply where the injury complained of existed at the time of the making of the lease (*Bloomer v. Merrill*, 1 *Daly*, 485; 29 *How. Pr.* 259); and where a tenant took possession of demised premises and removed within twenty-four hours thereafter, on account of blasting, on the adjoining lot, and it not appearing whether the house was unfit for occupation before or after the tenant took possession, it was held that the tenant was not exonerated by the act of 1860 from paying rent (*Murray v. Waller*, 42 *How. Pr.* 64); and to be absolved from paying rent, under this act, the tenant must surrender possession of the premises, and he will be held liable for the whole rent if he retain possession of any part (*Johnson v. Oppenheimer*, 34 *N. Y. Superior Court*, 416, *aff'd* in 55 *N. Y.* 280).

In *Fash v. Kavanagh* (24 *How.* 347), it appeared that the defendant occupied rooms in the plaintiff's

* So in the original.

building, under a hiring by the month, the rent being paid in advance. The action was brought for the month's rent, payable August first, and the tenant's defence was twofold : 1. That he removed from the premises in the month of July, and before the rent claimed became due. 2. That before he left, the contents of the privy attached to the house overflowed his apartments, rendering them untenable, and unfit for occupancy ; and having been on this account obliged to abandon them, he was not thereafter bound or liable to pay rent, and in delivering the opinion of the court, HILTON J., said : " I think the proof at the trial entitled the tenant to judgment on both grounds. The defendant testified positively that he left on the 23d of July, and then offered the keys to the plaintiff's agent, who declined to receive them. That at the time, the filth from the privy had flowed over his apartments, rendering them untenable and unfit to occupy." The learned judge after deciding that the tenancy was only for the month, and that it had been terminated before the rent sued for accrued, proceeded to the second ground of defence, and said that " the reason assigned by the tenant for leaving was undoubtedly sufficient to justify an abandonment under the provisions of the act of 1860 " (*supra*), and referring to that act he continued: " The injury contemplated must obviously be of a physical nature, such as if done by the landlord would amount to an eviction of the tenant from the whole or part of the demised premises. It must be to the building occupied, and not caused by the privy or procurement of the tenant, or by his neglect or want of proper care. If it be of the nature the present case discloses, I have no doubt it would fall within the class of injuries which the law was passed to meet. As an occupant of premises in a tenement house, the defendant was not bound to either see to the erection of a proper sink or privy upon premises, or to cause it to be emptied, to prevent an overflow. This was a matter which the

landlord who, by maintaining a building of that class—one of those so-called modern improvements which the necessities of the present day have required to be erected in the compact portion of our city, where rents are high and the poor abound—was required to look after and prevent, or else stand to the consequences. I do not mean to be understood as holding that a landlord is required, after he has rented a house, to attend to the emptying of the sinks and cesspools attached to it; on the contrary, that duty ordinarily devolves upon the tenant, who is bound to see that the premises are not injured by any inattention to his duties in this respect; but I do mean to say, that modern improvements require appropriate rules, and, as in a tenement house, no occupant of a single room, renting direct from the landlord for a short and may be uncertain term, generally from month to month, can be required to perform this duty, it follows of necessity that it must fall upon the landlord to attend to it. On the other hand, if, as the plaintiff's agent testified, the filth came from the adjoining premises, and as it is not contended it thus came through any fault, procurement or neglect of the defendant, it was equally an injury to the building within the provisions of the law referred to. It will probably be said that if this view be correct, a landlord may be left without remedy against the acts of those who covertly furnish his tenants with excuses for abandoning demised premises. I can only answer, that the statute is certainly extraordinary in its character, and may give rise to great abuses being practiced under it by unwilling tenants upon land-owners; but it is our duty only to construe its provisions, and not speculate upon the injustice it may produce, leaving it to future legislatures to remedy any of the evils that may spring from it."

In *Snydam v. Jackson* (54 *N. Y.*, 450) it was held "that the act of 1860 before referred to, has reference to

a destruction or injury from some sudden and unexpected action of the elements, or other cause, and not to the gradual deterioration and decay produced by the ordinary action of the elements, and that it does not affect the common-law rule requiring the tenant to make ordinary repairs." This is the most important decision under this act, and is controlling as to the construction of it.

(See Title "Eviction," *ante*, p. 121.)

CHAPTER XVI.

OF EXCAVATIONS.

Excavations, particularly upon city lots, frequently tend to endanger adjoining buildings, and therefore give rise to important questions of duty and responsibility, which sometimes require prompt decision upon the part of those interested, in order that the rights of property and possession, in the buildings endangered should receive the necessary protection and support from the persons owing that duty. These questions, therefore, more frequently arise between the owner or occupant of the buildings endangered by the excavation, on the one side, and the party making the excavation upon the other ; and sometimes come up between the tenant of the endangered building and his landlord, and in order to present the respective rights, duties, and liabilities of these several interests intelligently, it will be necessary to consider first the general right to excavate, and next the rights of the adjoining owner, and of his tenants in possession of the building endangered by the excavation, growing out of the inconveniences arising therefrom. *First. As to the general right to excavate,* the maxim, *sic utere tuo, ut alienum non lædas*, is not of universal application ; for as a general rule, a man who exercises proper care and skill, may do what he will with his own property, provided the act done does not amount in law to a nuisance (*Radcliff's Executors v. The Mayor, &c., of Brooklyn, 4 N. Y., 196*), and an owner may excavate his land to any extent he deems necessary for building purposes, or for any legitimate use to which he intends to put the property, being liable only for the want of proper care and skill in doing the work.

Of course the landlord can not excavate upon any part of the demised premises, during the term, without the tenant's consent, for such an excavation would amount to an unlawful deprivation by the landlord of part of the thing demised, and would operate as a constructive eviction of the tenant, and as a suspension of the rent, while the eviction continued.

Excavations as affecting adjoining owners.

A distinction is made in many of the cases between the right of an owner of unimproved property to its natural support from adjoining land, and the right of an owner who has, by the erection of buildings, put an artificial weight upon his land so as to require for it greater support than it would have required in its natural state; and while the first right is sustained by numerous authorities, the latter right is universally denied.

This distinction is stated by Rolle, in his abridgment. He first gives the judgment of the court in *Wilde v. Minsterley*, to the effect that if A erect a house on the confines of his land next adjoining the land of B, and B afterwards digs his land so near the foundation of A's house (but on no part of his land), that thereby the foundation, and the house itself, fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near to B's land; for he, by his own act, can not hinder B from making the best use of his own land that he can. Rolle then adds: "But it seems that a man who has land next adjoining my land can not dig his land so near mine that thereby my land shall go into the pit; and, therefore, if an action had been brought for that, it would lie."

This same distinction was noticed and approved in *Thurston v. Hancock* (12 *Mass.*, 220; see also *Farrand v. Marshall*, 21 *Barb.* 409). In *Lasala v. Holbrook*

(4 *Paige*, 169), the Chancellor decides that I can not, by erecting a building near the extremity of my own land, deprive the adjoining owner of the right of digging in his own soil for a legitimate purpose, even though my house be thereby ruined, but he says, "I have a natural right to the use of my land, in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots; and the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier;" but the Court of Appeals in *Radeliff's Executors v. The Mayor &c.*, of Brooklyn (4 *N. Y.* at p. 203), speaking of this distinction say, that although the reasoning of the Chancellor is not without some force, so long as the land on both sides remains in its natural state, yet it was considered unsound—especially in reference to property in cities and large towns—the court observing that if the doctrine were carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property; that an unimproved lot in the city, would be worth little or nothing to the owner, unless he were allowed to dig in it for the purpose of building; and that if he may not dig because it will remove the natural support of his neighbor's soil, he has but a nominal right to his property, which can only be made good by negotiation and compact with his neighbor: that a city could never be built under such a doctrine; and *BRONSON*, C. J., in the same case says, "I think the law has superseded the necessity for negotiation, by giving every man such a title to his own land that he may use it for all the purposes to which such lands are usually applied, without being answerable for consequences; provided he exercise proper care and skill to prevent any unnecessary injury to the adjoining land-owner." But a man may do many things under a lawful authority, or in his own land, which may result in an injury to the property of others, without being answerable for the consequences. In-

deed an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. Nor will a man be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill upon his part; and a man may in the enjoyment of his own property, without being liable for consequential damages build upon his own land, though it stops the lights of his neighbor (*Parker v. Foot*, 19 *Wend.* 309), and even though he build for the very purpose of stopping the lights (*Mahan v. Brown*, 13 *Id.* 261); and a man has a right to build a fence upon his ground for the purpose of darkening the windows of his neighbor (*Pickard v. Collins*, 23 *Barb.* 444). He may pull down his own house, though the adjoining house fall for the want of the support which it before had; and he may do it without shoring up the adjoining house—that being the business of the owner (*Peyton v. The Mayor, &c.* 9 *B. & C.* 725). He may pull down his own wall, though the vaults of his neighbor be thereby destroyed (*Chadwick v. Trower*, 6 *Bing. N. C.* 1). He may build a house, and make cellars upon his soil, whereby a house in the adjoining soil falls down (*Com. Dig.* action on the case for Nuisance, *c.*). He may dig in his own land, though the house which his neighbor has previously erected at the extremity of his land be thereby undermined and and fall into the pit (2 *Rolle's Abr. Trespass*, I. pl. 1; *Wyatt v. Harrison*, 3 *B. & Ad.* 871).

In *Panton v. Holland* (17 *Johns.* 92), the defendant excavated for the purpose of laying the foundation walls on his lot adjoining the plaintiff's house on the contiguous lot, whereby the walls of the plaintiff's house were cracked, and the house was otherwise injured; and it was held that no action would lie.

In *Lasala v. Holbrook* (4 *Paige*, 169), the plaintiffs were the owners of a church, built within six feet of the

line of their lot, and the defendant, for the purpose of building in his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet an injunction to restrain the excavation, which had been granted by a master, was dissolved by the chancellor, on the ground that the defendant was exercising a lawful right.

In *Thurston v. Hancock* (12 *Mass.* 220), the plaintiff had built a valuable house on Beacon hill, in the city of Boston, one side of the house being within two feet of the side of his land, and had taken the precaution to sink his foundation fifteen feet below the ancient surface of the ground. Seven years afterwards the defendant commenced digging and carrying away the earth from his adjoining land, and dug to the depth of from thirty to forty-five feet below the natural surface of the ground; by reason of which the foundation of the plaintiff's house was rendered insecure, and he was obliged to take the house down. And yet it was held that no action lay for the injury to the house, because the defendants having the entire dominion, not only of the soil, but of the space above and below the surface, could not be restrained in the exercise of their right, unless by covenant, or by custom; that the house had not the qualities of an ancient building, so that the plaintiff could prescribe for the privilege of which he had been deprived; and that a man who builds a house adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land.

In *Dodd v. Holme* (1 *Ad. v. Ellis*, 493), the defendant was held liable on the ground that the injury complained of was occasioned by his negligence.

In Pennsylvania, it was held that where the owner of two adjoining lots builds thereupon, he is bound to use proper materials and reasonable skill. If he does

not, and the wall falls, upon his neighbor's excavating his own lot, using reasonable care, no damages are recoverable (*Rickart v. Scott*, 7 *Watts*, 460 ; and see *Oat v. Middleton*, 2 *Miles*, 247 ; *Norris v. Adams*, *Id.* 337 ; *White v. Snyder*, *Id.* 395).

An owner has the right to take down his building and excavate the soil, or to do the latter act alone. Although by these acts the other building is injured or endangered, this furnishes no ground of action provided reasonable notice was given, and proper care used in the operation, which is a question for the jury. It is otherwise, however, where an adjoining owner claims under a grant or an ancient or prescriptive right pertaining to the building or the foundation. This title limits and controls that of his neighbor ; so, where the wall of the house taken down has long supported the beams of the other house, this may give a right to have the beams inserted in the new wall (*Peyton v. St. Thomas*, 9 *Barn. & Cr.* 725 ; *Massey v. Goyder*, 4 *Carr. & P.* 161 ; *Wyatt v. Harrison*, 3 *Barn. & Ad.* 871 ; *Jones v. Bird*, 5 *Barn. & Ad.* 837 ; *Rickart v. Scott*, 7 *Watts*, 460 ; *Dodd v. Holme*, 3 *Nev. & M.* 739 ; 1 *Ad. & Ell.* 493 ; *Trower v. Chadwick*, 3 *Bing. N. C.*, 334 ; *Partidge v. Scott*, 3 *Mees. & W.* 220 ; *Bradbee v. Governors, &c.*, 2 *Dowl. P. R.* 164 ; *Davis v. London, &c.*, 2 *Nich. &c.*, 308). A declaration alleged that the plaintiffs were possessed of a vault, and of certain wine therein ; that the defendant was about to pull down and remove certain other vaults and walls, next adjoining the plaintiff's vault ; and therefore was bound, in the event of his not shoring-up or protecting said vault, to notify the plaintiff of his intentions, that the plaintiff might thereby protect his own property ; and also to pull down and remove the vaults and walls with such care and skill that the plaintiff should not be injured thereby, and it was held that the defendant was not bound to shore-up the plaintiff's vault, to notify him of his intentions, nor, in the absence of any knowledge

on his part as to the existence and situation of the plaintiff's vault, to use such care and skill in the operation, as would prevent injury to the plaintiff (*Chadwick v. Trower*, 8 *Scott*, 1 ; 6 *Bing. N. C.* 1).

A owned a building, the footing of one of the walls of which supported one of the walls of an adjoining house, belonging to B. A being about to pull down and remove the foundations of his house, notified B of his intention, and used reasonable and ordinary care in the work, but took no means to preserve B's building, although the nature of the soil required him to lay the new foundation several feet deeper than the old ; and it was held that A was not liable for an injury thereby caused to B's house (*Massey v. Goyder*, 4 *Carr. & P.* 161).

In an action on the case the declaration alleged that A was lawfully possessed of a dwelling-house, adjoining a dwelling-house of B, and that B dug into the soil and foundation of the latter so negligently, and so near A's house, that the wall of this house gave way. Upon demurrer to that part of the declaration which alleged the digging so near, &c., the defendant had judgment. The question was stated to be, whether, if one builds to the extremity of his own land, the adjoining owner may dig the ground there so as to remove some of the soil which supported the building. It was suggested, that if the building were an ancient one, or if it did not increase the weight upon the soil of the party erecting it, an action might lie. But one is not to be debarred from digging his own soil, because his neighbor's will then become incapable of supporting an artificial weight (*Wyath v. Harrison*, 3 *Barn. & Ad.* 871).

In *Brown v. Windsor* (1 *Crompt. & Jer.* 20), an exception to the rule arising out of acquiescence on the part of the plaintiff was considered. These facts appeared : In 1803, the house of A, the plaintiff, was built against the pine end wall of the house of B, the defendant, by

permission. In 1829, B made an excavation in a careless and unskillful manner, in his own land, near this wall, thereby weakening it and injuring A's house, and it was held, that both the express permission and the long acquiescence gave A a right of action ; and that the declaration alleging ownership of a house, belonging to and supporting which were certain foundations, was well supported, as it intended only an *easement* in such foundations.

In several of the cities, party walls, buildings, and excavations are regulated to a certain extent by statute. The New York statute, applicable to lands in the cities of New York and Brooklyn, provides :

“§ 34. That whenever excavations hereafter commenced, for building or other purposes, on any lot or piece of land in the city and county of New York, and the city of Brooklyn, shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall, wholly or partly on adjoining land and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times from the commencement until the completion of such excavations at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced (1855, ch. 6, and see 2 *R. S.* 5th (*Banks*) ed. p. 1002).

This statute, it will be observed, changes the common-law rule, as to those two cities (New York and Brooklyn), in cases where the party excavating intends to carry the excavation to the depth of more than ten feet below the curb, and in such cases the persons causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, *and not otherwise*, are required at all times from the commencement until the completion of such excavations, at

their own expense, to preserve such wall from injury and to so support the same by a proper foundation that it will remain as stable as before such excavation was commenced. The duty under this statute attaches to the party making the excavation only in cases where it is intended to carry the excavation to a greater depth than ten feet below the curb, and in such cases only upon being afforded by the owner of the adjoining land the necessary license, to enter upon it, for the purpose of such protection, and this license must be explicit, and sufficient to protect the party excavating, and it should be given by all persons who would be injuriously affected by such acts (*Sherwood v. Seaman*, 2 *Bosw.* 127), and in all other cases the common-law rule remains in force.

The effect of adjoining excavations upon the relation between the landlord and tenant of the house inconvenienced by them.

If a tenant in possession of a building suffer damage to his possessory rights by adjoining excavations, he may if it be a case in which the party making the excavation is liable in damages according to law, recover by action whatever damages his particular estate or property received by the wrongful act of the party excavating.

As between the tenant thus injured and his landlord, however, the rule of law is that a landlord, in the absence of an express covenant, is under no obligation to repair, or to do any act to protect his tenant from the consequences of the lawful acts of the owner of adjoining premises, in excavating them to such depth as would endanger the stability of the demised premises (*Sherwood v. Seaman*, 2 *Bosw.* 127; *Howard v. Doolittle*, 3 *Duer.* 464; *White v. Mealio*, 37 *N. Y. Superior Ct.* 72); and mere knowledge of the landlord, that his tenant is willing that he should give the license provided for by statute, does not create a duty to give it, nor

subject the landlord to an action, because he did not give it (*Sherwood v. Seaman, supra*).

A lessee, who covenants to restore the premises at the end of the term, "in as good order and condition, &c. (reasonable use and wearing thereof, fire and other unavoidable casualties excepted), as the same now are or may be put into by the lessor," and to pay rent during the term, is not excused from paying rent, by the undermining of the partition wall by the owner of the land adjoining, while building upon his own premises, after notice to the lessor of his intention to build, and the lessor's omission to support the wall, even if by the custom of the place, the landlord is bound to support and secure his foundation and walls in such cases (*Kramer v. Cook, 7 Gray (Mass.) 550*).

A lease that provides that the landlord may at reasonable hours in the day time enter the premises to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof, or of the building, gives a clear right and authority (in case the excavation of the adjoining property threatens injury or destruction to the building or premises leased), to enter the premises and *shore-up* and strengthen the same, by running large pieces of timber known as "needles" through the basement to support the floor of the store occupied by the tenants, and in such case the landlord is not liable in damages to the tenant, for an interruption to business, &c., unless it appears that the work was done in an unskillful and negligent manner (*White v. Mealio, 37 N. Y. Superior Ct. 72*).

And where a landlord owning a lot adjoining the demised premises, built a house on such lot so as to cut off the tenant's light and air, the obstruction was held not to amount to an eviction (*Palmer v. Wetmore, 2 Sandf. 316*; *Myers v. Gemmel, 10 Barb. 537*).

Other acts of adjoining owners.

Where a person is authorized to do an act upon an-

other's premises the natural effect of which is to endanger the lives and property of those giving the authority, the person so authorized to do the act is bound to provide and maintain all suitable and proper safeguards against injurious results therefrom. The law presumes that the authority given is coupled with that condition.

The owner of land is, therefore, limited in the use of it, by the rights of others to the lawful possession of theirs, and in making use of his own he is liable for direct injuries to their possession, without regard to the extent or motives of the aggression. Thus the owner who in making a lawful excavation on his own land, casts earth and stones upon that of his neighbor by blasting is answerable for the damage, though no negligence or want of skill be proved (*Hay v. Cohoes Co.*, 2 *N. Y.* 159, 163, aff'g 3 *Barb.* 42; *Gourdier v. Cormack*, 2 *E. D. S.* 200; *Ulrich v. McCabe*, 1 *Hill.* 251); and in such case the tenant may have an action for his injury to his possession, as well as the reversioner, under the statute, for injury to the reversion (*Gourdier v. Cormack*, *supra*; *Ulrich v. McCabe*, *Id.*; *Hardrop v. Gallagher*, 2 *E. D. S.* 523).

Excavation adjoining highway.

Where excavations are made so near to a highway, that a person passing along by slipping may be precipitated into it, the person making the excavation will be liable for all the injuries sustained thereby, provided the person injured was himself guilty of no contributory negligence. A person can not rush blindly upon danger, and then charge the responsibility for his injuries upon another. In an action for injuries sustained by falling into a sewer in course of construction in a public street, it was held, that although the plaintiff previously knew that the sewer was being constructed, yet in the absence of any guard-light, or other special

notice sufficient to call her attention to the hazard she ran, she was not guilty of contributory negligence in attempting to cross the street ; that in such an action it is a question of fact for the jury to determine, on conflicting evidence, whether at the time of the accident the excavation was without sufficient guard or light, and that it was also a question for the jury in such a case, under proper instruction by the court, whether the plaintiff was guilty of contributory negligence (*Bateman v. Ruth*, 3 *Daly*, 378).

CHAPTER XVII.

PARTY WALLS.

In our populous cities, the value of land and proper economy in its use, have given rise to that species of easement known as party walls. Their frequent use suggest many interesting questions affecting the rights and liabilities of those owning adjoining lands, separated by party walls. These walls are generally used between two estates for their common benefit, in supporting adjoining buildings. They may rest entirely upon the land of one or upon that of two adjoining owners, in equal or in any other agreed proportions. They are created by grant, agreement, or by prescription. In general, however, party walls will be found "to be built on the common property of the two, and to be the common property of both;" and in the absence of any further proof than that which is afforded by evidence of a common user, such will be presumed to be the case. By the common law, party walls exist only by virtue of statutory provisions, grant, or prescription. If one lot owner erects a building upon the extremity of his land, the walls of which are entirely within his own domain, an adjoining owner can not use the wall to support his timbers without rendering himself liable as a trespasser. But if he fastens his timbers in the wall by the consent of the owner, and maintains them there uninterruptedly for twenty years, or the usual statutory period, the wall becomes charged with the servitude of support as a party wall, and to that extent the owner loses his absolute and entire control over the wall.

The most usual and ordinary method of creating party walls is where the owner of adjoining lots erects

a block or a row of buildings thereon, the walls of each lot mutually supporting the other, and conveys the lots separately, making the wall the dividing line between the two. The mere fact, however, that a wall has been built partly upon to adjoining lots and is used by both, does not necessarily make it a party wall (*Roberts v. White*, 2 *Rob.* 425); nor does the fact that an adjoining owner has inserted the timbers of his building into the walls of the other owner, without permission, give him any right to the support of the wall, even though done without objection, unless there has been an express and unequivocal ratification of the act, or it has been continued for the statutory period (*McConnel v. Kibbee*, 33 *Ill.* 175). The question whether an executed *verbal* agreement between adjoining owners in regard to a party wall, was enforceable or not, came up in the New York Marine Court at the June term, 1875, upon a motion for a new trial, in the case of *Polye v. Sheehy, et al.* (reported in the *New York Daily Register*, of July 12, 1875), the opinion in which case contains the various authorities upon the subject, and it is on that account considered of sufficient interest for publication.

McADAM, J.—This action is brought to recover one-half of the expense of a party wall, erected one-half upon the plaintiff's land and one-half on land which the plaintiff claims belongs to the defendants. The recovery is claimed under a parol agreement, made about July, 1870, whereby the defendants agreed to pay the plaintiff three hundred and fifty dollars, upon the completion of the work. The jury, upon the conclusion of the trial, found the contract to be as alleged, and also found that it had been performed in all things by the plaintiff, and awarded him a verdict for the agreed price, with interest. The defendants now move for a new trial, upon the ground that the agreement is one which creates an interest in land, and that it is on that account void, not being in writing (3 *R. S.*, 5th ed. p.

220, §§ 6, 8). This objection is inapplicable to the present case.

The agreement does not create an interest in lands within the meaning of the statute. It is substantially an agreement to pay for improvements upon land, distinct from title or possession, or in other words, to pay for work and labor bestowed upon the land, and such promises, although by parol, do not come within the statute (*Lower v. Winters*, 7 *Cow.* 263; *Frear v. Hardenergh*, 5 *Johns.* 272; *Benedict v. Beebee*, 11 *Id.* 145; see also 37 *N. Y.* 106).

The Superior Court, general term, in *Maxwell v. East River Bank* (3 *Bosw.* 146; per BOSWORTH, J.), held: "We regard it as settled law, that when the owners of adjoining lots agree, though verbally, that each will erect a building or store on his own lot, and that the dividing wall shall be a party wall, and shall be used to support the beams and roof of each building, and they build according to such agreement, and with a view to execute it, neither can remove or do anything to impair the stability or sufficiency of such wall, so long at least, as the buildings continue in a condition to subserve in every substantial respect the uses for which they were erected."

In *McLarney v. Pettigrew* (3 *E. D. Smith*, 111), an action commenced to recover the alleged consideration for a parol license, granted by the plaintiff, to insert into the wall of his house the beams of a building in course of erection by the defendant, the Common Pleas, general term, held: "There is nothing in the contract giving the defendant any interest in the land. Whenever the wall shall be removed the plaintiff's title to the land will remain unimpaired, and the defendant will have no claim to rebuild the wall on the plaintiff's lot or to use any other wall the plaintiff might build. It is a mere license to insert the beams in the present wall, without any interest in the land on which the

wall stands. A license of this kind is not within the statute."

In *Talmadge v. Rensselaer & S. R. R. Co.* (13 *Barb.* 493), the Supreme Court held that an agreement by one party, on a sufficient consideration, to build and keep up a division fence between him and the other party is not an agreement creating an interest in the lands, and does not fall within any of the cases where the contract was required to be in writing. The rule that an action will not lie upon a parol contract creating an interest in land has, like many general rules, its exceptions, depending upon the peculiar circumstances of each particular case; and, where such contracts have been fully executed upon the one side, recoveries have in some instances been allowed against the other, notwithstanding the statute. (For example, see *Thomas v. Dickenson*, 12 *N. Y.* 364; *Bowen v. Bell*, 20 *Johns.* 338; *Murray v. Smith*, 1 *Duer*, 412; *Hess v. Fox*, 10 *Wend.* 436).

In *Rundge v. Baker* (57 *N. Y.* 209), the Commission of Appeals held that where, under a parol agreement between two adjoining proprietors to jointly build a party wall, one-half on the premises of each, and the parties have gone on and built a portion of the wall, and the one who has prepared his materials and planned his buildings in view of and relying upon the performance of the contract, upon the refusal of the other to proceed, may complete the wall himself, and recover of the other one-half of the expense, and that the statute is no impediment to such recovery.

The contract sued upon in the present case, although not in writing, was under the circumstances binding upon the parties, and for this reason the motion for a new trial must be denied.

The general principles of law, in regard to party walls, are best illustrated by a reference to the authorities, in which these principles have been applied to the peculiar circumstances of particular cases. Thus when the owners of adjoining lots, by agreement, construct a

wall, partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, is a party wall in the legal sense of the term, and the owner of each house has an easement for its support in that portion of the wall which stands on the adjoining lot. So, when the owner of two adjoining lots erects a building on each with a wall partly on each lot, for their common support, a conveyance by him of either lot, conveys with the building an easement for its support on that part of the wall which stands on the other lot (*Webster v. Stevens*, 5 *Duer*, 553; *S. P. Eno v. Del Vecchio*, 4 *Id.* 53). This is true not only of the foundation wall (*Webster v. Stevens*, 5 *Duer*, 553; *Eno v. Del Vecchio*, *supra*), but of the entire wall of the building abutting upon the adjoining premises, so far as it is made use of by, and furnishes support for, the building of the adjoining owner, even though the wall is not made the division line. A conveyance of part of a block, or row of houses, in the usual form with all appurtenances passes an easement for the support of the part of the building so conveyed (*Eno v. Del Vecchio*, *supra*; *Glen v. Davis*, 35 *Md.* 208; 6 *Am. Rep.* 389); and the easement would pass even though the word "appurtenances" was wholly omitted from the conveyance. The easement is open and apparent, and passes as an incident to, and a part of the estate the same as any other easement.

In the *United States v. Appleton* (1 *Sumn. U. S.* 492), it appeared that in 1808 a block of buildings was erected in Boston, consisting of a central building and two wings, with a piazza extending along, in front of, and for the entire length of the central building, with doors in the sides of the wings, which opened on, and swung over the piazza, the upper part of which doors had glass in them, and were used as windows. In 1811, the two wings were conveyed to different persons, no mention being made in the conveyance of the doors opening upon the piazza. In 1816 the central building

was sold and conveyed to the United States. The Government claimed the right to erect a building to cover their entire lot, which would close up the doors of the wings; but the court held that the use of these doors and windows passed as appurtenances, and that, too, without any reference to the length of time they had been used. There is no duty or obligation on the owners of adjoining building lots in a city, to unite in building a party wall on the dividing line (*Sherred v. Cisco*, 4 *Sandf.* 480). If the owner of a city lot, on building it, place half of the wall upon the adjoining lot; the owner of the latter is not liable to contribute towards the expense of the wall, upon his subsequently using, in his own erection, the part which stands upon his own land (*Id.*). So where party walls are erected by one of two adjoining lot owners, the wall resting upon the land of both, there is no obligation at common law on the part of the other owner to contribute toward the expense of the construction of the wall, where he subsequently uses it as a support for a building erected by him. His doctrine rests upon the principle that the land owner is to be his own judge as to what disposition he will make of, or what erection he will make upon his land, and that he is not to be benefited without his own request or sanction (*Moore v. Cable*, 1 *Johns. Ch.* 385; *Gillett v. Maynard*, 5 *Johns.* 58; *Dewey v. Osborn*, 4 *Cow.* 329; *Erwin v. Olmstead*, 7 *Id.* 229; *Sherred v. Cisco*, 4 *Sandf.* 480); where two adjoining owners enter into an agreement by which one of them erects a party wall resting upon the land of each, and erects a building thereon, under a promise from the other owner that whenever he uses the wall by the erection of a building thereon, he will pay one-half of the expenses thereon, he will pay one-half of the expense of the construction, this is not a covenant running with the land, and will not be binding upon, nor can it be enforced against the grantee of the adjoining lot in favor of the grantee of the builder of the

wall, even though he uses the wall as a support for a building erected by him after his purchase of the premises. The benefit of a covenant passes with the land to which it is incident, but the liability imposed by the covenant is confined to the original covenantor, unless a privity of interest between him and the covenantee exists or is created at the time when the covenant is made, such a covenant is personal to the builder, and does not pass by grant (*Hurd v. Curtis*, 19 *Pick.* 459; *Black v. Isham*, 16 *Am. Law Reg.* [*Ind.*] 8; *Keppel v. Bailey*, 7 *Myl. & K.* 517; *Todd v. Stokes*, 10 *Penn. St.* 155; *Dauids v. Harris*, 9 *Id.* 503; *Gilbert v. Drew*, 10 *Id.* 219; *Hart v. Kurcher*, 5 *S. & R.* 1; and see the cases cited at page 114, *ante*, but see *Brown v. Pentz*, 1 *Abb. Ct. of App. Decis.* 227, and 57 *N. Y.* 684). A grant to A. and his heirs, and his right to erect and maintain a party wall on the top of the grantor's wall; *held*, even, if not in fee, to give the right so long as the sustaining wall stood, and answered the purpose (*Brondage v. Warner*, 2 *Hill*, 145).

Party wall not an incumbrance.

A party wall creating a community of interest between adjoining proprietors is in no sense to be deemed a legal incumbrance upon the property, and a party purchasing a hotel and premises at public auction, without being informed that part of the walls of the hotel adjoining other buildings are party walls, can not, for that cause, refuse to complete the purchase. As between adjoining proprietors maintaining party walls, their mutual easement in walls is a benefit and not a burden to each of them. It is a valuable appurtenant which passes with the title of the property (*Hendricks v. Stark*, 37 *N. Y.* 106).

Provisions of the building law upon the subject of party walls.

The statute relating to buildings in the city of New York, passed April 20, 1871 (chap. 625, as amended,

May 22, 1874, chap. 547), contains among others the following provisions in reference to buildings in said city. Section 3, among other things provides that, "Whenever there shall be any excavation, either of earth or rock, hereafter, commenced upon any lot or piece of land in the city of New York, and there shall be any party or other wall wholly or partly on adjoining land and standing upon or near the boundary line of said lot, if the person or persons whose duty it shall be, under existing laws, to preserve and protect said wall from injury shall neglect or fail so to do, after having had a notice of twenty-four hours from the department of buildings so to do, the superintendent of buildings may enter upon the premises, and employ such labor and take such steps as in his judgment may be necessary to make the same safe and secure, or to prevent the same from becoming unsafe or dangerous, at the expense of the person or persons owning said wall or building of which it a may be a part, and any person or persons doing the said work, or any part thereof, under and by direction of the said superintendent, may bring and maintain an action against the owner or owners, or any one of them, of the said wall or building of which it may be a part, for any work done or materials furnished in and about the said premises, in the same manner as if he had been employed to do the said work by the said owner or owners of the said premises."

Section 5 provides that : "In all dwelling-houses that may hereafter be erected not more than fifty-five feet in height, the walls shall not be less than twelve inches thick, and if above fifty-five feet in height, and not more than eighty feet in height, the outside walls shall not be less than sixteen inches to the top of second story floor beams ; provided the same is twenty feet above the curb level, and if not, then to under side of the third story beams, and also provided that portion of the wall that is twelve inches thick, shall not exceed forty feet above the said sixteen inch wall ; and in

every dwelling-house hereafter erected more than eighty feet in height, four inches shall be added to the thickness of the wall for every fifteen feet or part thereof that is added to the height of the building. All party walls in dwellings over fifty-five feet in height shall not be less than sixteen inches in thickness."

Section 6 provides that: "In all buildings other than dwellings hereafter erected, the bearing walls shall not be less than twelve inches thick to the height of forty feet above the curb level ; if above forty feet in height, and not more than fifty-five feet in height, the bearing walls shall not be less than sixteen inches thick ; if above fifty-five feet, and not more than seventy feet in height, the bearing walls shall not be less than twenty inches thick, to the height of twenty feet above the curb level, or to the next tier of floor beams above, and not less than sixteen inches from thence to the height of fifty-five feet above the curb level or the next tier of floor beams, and not less than twelve inches thick from thence to the top ; and if above seventy feet and not more than eighty-five feet in height, the bearing walls shall not be less than twenty-four inches thick to the height of twelve feet above the curb level or the second story floor beams, and from thence to the height of sixty feet above the curb level, the said walls shall not be less than twenty inches thick, and from thence to the top not less than sixteen inches thick ; and if above the height of eighty-five feet, the bearing walls shall be increased four inches in thickness for every fifteen feet, or part thereof, that shall be added to the height of said wall above the eighty-five feet. In all buildings over twenty-five feet in width, and not having either brick partition walls or girders supported by columns running from front to rear, the walls shall be increased an additional four inches in thickness, to the same relative thickness in height as required under this section for every additional ten feet in width of said

building, or any portion thereof. It is understood that the amount of materials specified may be used either in piers or buttresses, provided the outside walls between the same shall in no case be less than twelve inches in thickness to the height of forty feet, and if over that height, then sixteen inches thick ; but in no case shall a party wall between the piers or buttresses of a building be less than sixteen inches in thickness. In all buildings hereafter erected, situated on the street corner, the bearing wall thereof (that is, the wall on the street upon which the beams rest), shall be four inches thicker in all cases than is otherwise provided for in this act. All walls other than bearing walls may be four inches less in thickness than required in the clauses and provisions of this section above set forth, provided no wall is less than twelve inches in thickness."

There are various other general provisions concerning buildings in the city of New York, and their mode of construction, and the character of the materials to be used therein, and these statutes will be found in the laws of 1871, ch. 625, amended in 1874, by ch. 547, of the laws of that year, and reference is thereunto made for such of said general provisions as are not hereinabove contained.

Increasing the thickness of party and other walls.

The statute contains the following provisions upon the subject :

"§ 35. It shall be lawful to increase the thickness of any partition wall or other wall between two adjoining buildings in the city of New York, erected before the passage of the act of 14th April, eighteen hundred and fifty-six, in relation to buildings in said city, provided that such additions be properly and securely tied into the original wall by iron fastenings or slabs of stone, so as to make a firm wall of not less than sixteen inches in thickness ; and such wall when so altered shall be deemed and taken to be a sixteen-inch wall in like manner as if originally built of that thickness, anything

in the before-mentioned act to the contrary notwithstanding" (1857, ch. 225, § 1).

The act above referred to is chap. 188, of Laws, 1856, entitled, "An act to provide against unsafe buildings in the city of New York."

"§ 36. If any owner or part owner of any wall heretofore erected between two adjoining buildings in the city of New York, shall refuse to give his written consent to the reconstruction thereof, by the entire substitution of a new wall of the thickness now required by law in buildings more than fifty feet in height, it shall be lawful to increase the thickness of such wall by additions thereto, to be firmly secured by sufficient and proper iron anchors, or slabs of stone, making together a wall of at least sixteen inches in thickness; and such wall so strengthened and increased shall be deemed and taken to be a sixteen-inch wall, in like manner as if the same had been originally built of that thickness" (1857, ch. 225, § 2).

Chap. 6, of the Laws of 1855, entitled, "An act respecting excavations in the cities of New York and Brooklyn," will be found at page 140, *ante*; and the above sections, 35 and 36, will be found in chap. 225 of the Laws of 1857, under the title of "An act in relation to party walls in the city of New York." See also 2 *R. S.* 5th (*Banks*) ed., page 1002.

Diminishing thickness of party wall.

The owner of land having a party wall is not permitted to pare off a portion of the wall upon his premises with a view to the erection of a new wall entirely upon his own land, nor in any manner deal with the wall so as to diminish its sufficiency or strength (*Phillips v. Bordman*, 4 *Allen*, 147).

Increasing height and depth of party wall.

The height of the wall may be increased, and any changes made therein that the taste or convenience of either owner may dictate, so long as the same can be done without detriment to the strength of the wall, or

to the property of the adjacent owner ; but the party making the addition does it at his peril ; he stands as an insurer to the other of the safety of the work, and against injurious results therefrom ; and if injury does result he is liable for all the consequences (*Brooks v. Curtis* 50 *N. Y.* 639 ; *Eno v. Del Vecchio*, 4 *Duer*, 53 ; *Moody v. McClelland*, 39 *Ala.* 45 ; *Bertram v. Curtis*, 31 *Iowa*, 46 ; *McGittigan v. Evans*, 8 *Phila.* 264).

Either owner may do what he can with the wall to serve his individual necessities ; as to lower it, sink it, or raise it (*Eno v. Del Vecchio*, 4 *Duer*, 53 ; and see *Brooks v. Curtis*, 50 *N. Y.* 639), if he can do so without injury to the other.

And an agreement for a party wall does not prohibit either owner from extending the building beyond it in front and in rear (*Wolfe v. Frost*, 4 *Sandf. Ch.* 72).

Under a covenant, in an executory contract for the sale of a lot of land, by the vendor, to erect upon an adjoining lot, along the boundary line, a wall, and to grant to the purchaser the right to use such wall, in the erection of a house, *specifying the particular manner in which it was to be used*, it was held, that the purchaser did not acquire thereby a right to use such wall in any other way than that specified ; and that he was not entitled to prolong the limited course of his front wall across the boundary line of such two lots, so as to enter into the front wall of the vendor's building at the point or line where those walls meeting, adjoined the party wall (*Fettretch v. Leamy*, 9 *Bosw.* 510).

Repairing party walls.

Where two adjoining owners have erected a party wall at their joint expense, and have applied it to their joint benefit, each is bound to contribute ratably toward the expense of its necessary repair. But if the wall had become ruinous and fallen into decay, or is destroyed by fire or other cause, no liability attaches on the part

of either owner to contribute toward the construction of a new wall, if he has no present use therefor, even though he subsequently make use of the wall by building thereon (*Sherred v. Cisco*, 4 *Sandf.* 480 ; *Glen v. Davis*, 35 *Md.* 208 ; 6 *Am. Rep.* 389). But where the buildings upon the two lots are still standing, if the walls get out of repair, each owner is bound to contribute to its repair, but this liability does not exist except where there is a real necessity for repairs, and never when the expense is incurred merely to suit the convenience, or to serve the capricious ends of one of the owners, or when the adjoining owner has no further use for the wall ; nor when the wall has become so ruinous as to serve no useful end ; but when repairs in the wall are rendered necessary, either party has a right to make them, upon reasonable notice to the other, using such care and skill in the prosecution of the work as circumstances may require.

Taking down party wall.

If the wall is intact and capable of yielding support to one owner, it can not be taken down by the other, even though his building has been destroyed by fire, and every part thereof except this wall rendered utterly useless. The wall itself must have become unsafe or useless, or it can not be interfered with to the injury of the other (*Brondage v. Warner*, 2 *Hill*, 145 ; *Rodgers v. Sinsheimer*, 50 *N. Y.* 646 ; *Evans v. Jayne*, 23 *Penn. St.* 34 ; *Partridge v. Gilbert*, 15 *N. Y.* 601) ; but if the walls fall into a state of decay so that it becomes necessary to take them down and rebuild them, either party has the right to do so, upon reasonable notice to the other, using such care and skill in the prosecution of the work as the circumstances may require (*Partridge v. Gilbert*, *supra* ; *Dowling v. Hennings*, 20 *Md.* 179 ; *Richards v. Rose*, 9 *Exchq.* 218 ; *Cranshaw v. Sumner*, 56 *Mo.* 517).

In an action on the case by A, the owner of a leased house, against B, the owner of the adjoining house, for an injury for the pulling down of B's house, it appeared that the two houses were very old and decayed, and the party wall between them weak and defective. For some time pieces of timber, called *struts*, had been carried across H lane, on the east side of which B's house stood, to the opposite house on the west side of the lane. A's house adjoined B's eastward; and the *struts*, in sustaining B's, also supported A's. When B's house was taken down, the *struts* were necessarily removed, and no others substituted, nor were any upright shores placed in A's house to sustain the floors and roof, either of which measures would have answered the desired end. A's house consequently parted from the house adjoining it on the east, became unsafe to inhabit, partly fell or was taken down and rebuilt. B gave no notice that he was going to pull down the house, but both parties knew the defective state of the houses. There had been previous discussions between them, especially with regard to the party wall, and the statutory notice of rebuilding it had been given, but within the time fixed B's house was taken down. The taking down was done by day, and A's tenant must have known of it. Held, in the absence of evidence of any right to have his house supported by the defendants, he was bound in law to protect himself by the use of shores within, and that he could not complain that the defendant had neglected to do it (*Peyton v. The Mayor*, 9 *Barn. & Cres.* 725).

In *Potter v. White* (6 *Bosw.* 644), it was held that one of the owners of a party wall, used as such without written agreement for twenty years, can not remove it without the consent of the other, so long as it remains sound and suitable for the purposes of its erection.

In *Eno v. Del Vecchio* (6 *Duer*, 17), it was held that an improper interference with a party wall by one

owner, which injures the other building, is a trespass ; and either the tenant or the reversioner may maintain an action therefor, against the owner who employs a contractor to do the work by which the injury is done, as well as against the contractor ; and that it is not necessary to prove any negligence.

In *Partridge v. Gilbert* (15 *N. Y.* 601, aff'g 3 *Duer*, 185), it was held that when one building becomes so delapidated as to be unsafe and unfit for occupation, and the removal of the front and rear walls, with the floors and beams, would occasion the destruction of the entire wall, the owner of such building may, on reasonable notice to the adjoining tenant, lawfully take down the whole wall ; and if he occupy no unnecessary time in completing the work, and use proper care and skill in its execution, he will not be responsible to the adjoining tenant for damages resulting from exposure to weather, from loss of business, or inability to let the upper lofts.

In *Keteltas v. Penfold* (4 *E. D. S.* 122), it was held, that under a contract that a "division wall" should be taken down, and "in the place thereof" a party wall put up "on the division line," "to rest equally on the ground of each" party ; that the new wall was to be erected on the division line occupied by the former wall, and that A's devisees, sued upon his covenant, could not defend on the ground that the line was not the true boundary.

Rebuilding party wall.

In *Partridge v. Gilbert* (15 *N. Y.* 601), it was held that the easement in a party wall ceases when the walls falls into such a ruinous condition as to serve no useful purpose except by being replaced by a new one, and that neither owner has the right at common law, against the remonstrance of the other, to rebuild the wall and claim contribution therefor (see also *Sherred v. Cisco*, 4 *Sandf.* 480). The easement ends with the destruc-

tion of that in which it existed, and in the absence of a binding covenant between the parties or running with the land, neither party can be compelled to rebuild it, or to contribute toward the expense thereof, if it is rebuilt by the other (*Glen v. Davis*, 35 *Md.* 308 ; 6 *Am. Rep.* 389 ; *Pentz v. Brown*, 5 *N. Y. Leg. Obs.* 19 ; *Webster v. Stevens*, 5 *Duer*, 553 ; *Daniel v. North*, 11 *East*, 372 ; *Partridge v. Gilbert*, 15 *N. Y.* 601).

When a party wall between two houses has been rebuilt, all the servitudes belonging to the former one revive and continue in respect to the new wall or new house.

CHAPTER XVIII.

OTHER EASEMENTS.

- I. Definition of Easement.
- II. Rights of Way.
- III. Rights under covenant as to character of adjoining buildings.

I.

Definition of Easement.

An easement may be defined to be a privilege that one neighbor hath of another by grant, charter or prescription. It contemplates two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests; although it is not necessary that the dominant and servient estates should be contiguous.

II.

Rights of way.

One of the most common class of easements or servitudes known to the law is that of ways, or the right of one man to pass over the land of another in some particular line.

“A way of necessity” over the land of another is always of *strict necessity*, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow, does not alter the case. It is only where there is no way through his own land that the

right of way over land of another can exist. That a person claiming a way of necessity has already one way is a good plea, and bars the plaintiff. A way of necessity, *ex vi termini*, imports a right of passage through the lands of another, as being indispensable. Nor can one claim a way of necessity because of its superior convenience over another way which he has ; or as stated by another class of cases, a right of way exists only where the person claiming it has no other means of passing from his estate into the public street or road.

Of rights of way, there are two kinds, public and private. Public rights of way are rights of passage which every individual is entitled to enjoy, for the purpose of passing from one locality to another ; while private rights of way are rights which belong to a particular individual only, or to a body of individuals, either for the purpose of passage generally, or for the purpose of passing from a particular tenement of which they are possessed.

III.

Rights under covenant as to character of adjoining buildings.

It is well established, that under a covenant in a deed, providing against certain constructions, which may be noxious or offensive to neighboring inhabitants, those who have suffered from a breach of the covenant, though not parties to the deed, will be afforded relief in equity. *As the covenant is intended for their benefit*, it will be deemed to have given an easement in the land, and a court of equity will interpose to give them relief, by injunction against its infraction (*Gibert v. Peteler*, 38 *N. Y.* 165). A covenant in a deed of land, not to erect a building on a common or public square owned by the grantor in front of the

premises conveyed, is a covenant running with the land, and passes to a subsequent grantee of the premises without any special assignment of the covenant (*Trustees, &c. v. Cowen*, 4 *Paige*, 510), and where the owner of a block of ground in the city of New York divided it into lots, and sold the lots from time to time, to different individuals, and the conveyances of the lots contained mutual covenants between the grantor and grantees, respectively, against the erection of any livery stable, slaughter-house, glue factory, &c., upon any part of the lots conveyed, or any other manufactory, trade, or business, which might be any wise offensive to the neighboring inhabitants, it was held, that the covenants in the deeds of the different lots were for the mutual benefit and protection of the purchasers of lots in the block. And although a previous purchaser from the owner of the block could not sue at law, upon the covenant in the deed to a subsequent purchaser, the Court of Chancery might protect him by injunction against the carrying out of any noxious business or trade upon the lot of such subsequent purchaser (*Barrow v. Richard*, 8 *Paige*, 351). The owners of the lots on the north side of St. Mark's Place, in the city of New York, agreed by parol that the houses to be erected thereon should be set back eight feet from the line of the street, so as to have a court-yard of that depth and of the width of the lot in front of each house. The agreement was carried into effect by the erection of a row of dwelling-houses on a line with each other and having each a court-yard in front, and it was held, that the agreement thus executed became binding on the parties and their grantees, so as to render it the duty of a court of equity to restrain its violation. And that each house thus erected became a servient tenement with respect to the others, to the extent of the space in front, and to that extent each acquired an easement, that unless by the consent of all the owners could not be disturbed, and that an injunc-

tion restraining the defendants, who by mesne conveyances had become the owners of the lots, from building on the space so agreed to be left open, was properly granted (*Talmadge v. East River Bank*, 2 *Duer*, 614 ; S. C. on app. 26 *N. Y.* 105 ; S. C. sub. tit. *Maxwell v. East River Bank*, 3 *Bosw.* 124 ; and see *Perkins v. Coddington*, 4 *Robt.* 647) ; and a covenant against nuisances contained in a deed under which a person claims title constitutes an incumbrance within the meaning of that term, as settled by the authorities (*Roberts v. Levy*, 3 *Abb. N. S.* 311 ; *Gibert v. Peteler*, 38 *N. Y.* 165 ; *In re Whitlock*, 10 *Abb.* 316 ; *Trustees of Watertown v. Cowell*, 4 *Paige*, 510 ; 4 *Robt.* 647 ; 5 *Cowen*, 143 ; 21 *Wend.* 120 ; 8 *Paige*, 351 ; 12 *How. Pr.* 551 ; 26 *N. Y.* 105 ; 23 *Barb.* 153).

CHAPTER XIX.

LIABILITY TO THIRD PERSONS.

- I. Of tenant.
- II. Of landlord.

I.

Of tenant.

The tenant, as occupier, is *prima facie* liable to the public for injuries to third persons, caused by want of repairs, whatever private agreement there may be between him and the landlord ; but if he can show that the landlord is to repair, the landlord is liable for neglect to repair (*The Mayor v. Corlies*, 2 *Sandf.* p. 303). In *Cheetham v. Hampson* (4 *T. R.* 318), an action on the case was brought for not repairing fences, whereby the plaintiff was injured, and it was held that the action could only be maintained against the occupier, and not against the owner of the fee, who was not in possession ; and the same rule was laid down in 2 *Ld. Ray.* 804.

The following case shows the extent to which the principle that the tenant or occupier is alone liable, has been carried : “Where a complaint for damages in consequence of injuries received by the plaintiff in falling down, by the giving way of a back stoop and stairs, on a certain building owned by the defendant ; alleged, that the defendant, as owner, was bound to keep the premises, and especially the said stoop and stairs, in good condition and repair, and had neglected and refused to do so ; and in consequence of such neglect and refusal, the plaintiff had sustained the inju-

ries complained of. Held, bad on demurrer, because it appeared from the complaint that the premises were occupied, not by the defendant, but by third persons, and consequently it was upon the tenants, and not upon the defendant, as owner and landlord, that the duty of keeping them in repair presumptively rested, and that the averment that the defendant was bound to repair, without stating any facts from which the obligation resulted, was plainly insufficient, it being a conclusion of law" (*Corey v. Mann*, 14 *How.* 163).

It has been said that a landlord who lets a house in a dangerous state is not liable to the tenants, customers, or guests for accidents happening during the term (per EARLE, C. J., in *Robins v. Jones*, 15 *C. B. N. S.* at p. 240); but it has since been held, that a landlord who lets or relets premises in such a state as to constitute a nuisance, is responsible for such nuisance, notwithstanding the tenancy; and that the continuance of a tenancy from year to year is equivalent to a reletting (*Gandy v. Jubber*, 5 *B. & S.* 78; 33 *L. J. Q. B.* 151; but see 5 *B. & S.* 485; 4 *C. B.* 783; 16 *L. J. C. P.* 273); and owners of real property who let it with the defects complained of, are liable for injuries sustained by third persons by reason thereof, notwithstanding the possession was in their tenants at the time of the injury (*Moody v. The Mayor*, 43 *Barb.* 282; *S. C.* 34 *How. Pr.* 288); and if an owner so constructs and adapts a building, that in its ordinary use it would be injurious and offensive to plaintiff, and cast unwholesome odors into his house, he is liable for the nuisance thus caused. But if it proved a nuisance by reason of a special, unusual circumstance, he is not liable (*Pickard v. Collins*, 23 *Barb.* 444); where a tenant having a long lease of premises, so uses them as to create a nuisance, the landlord, having no power or right of interference, incurs no responsibility (Judgment of COMPTON, J., in *Gandy v. Jubber*, 5 *B. & S.*, p. 78; 33 *L. J. Q. B.* p. 154).

An owner of the freehold is liable for injuries resulting from the condition of the freehold itself, caused by his own negligence, whether in his actual occupation or not; and if he have let to another, with covenant to repair, he has been held liable to any third person for injuries resulting from his neglect to repair. If he build the upper part of his house so negligently that it fall, he is liable for his negligence to whomsoever may suffer thereby; and if he let a part of a building to one, and by reason of his construction of other portions of the same building, the tenant sustain an injury, the owner is liable (*Eakin v. Brown*, 1 *E. D. S.* 43). Either the landlord or the tenant, or both, are liable to indictment by the public for maintaining a ruinous house in a public place, or a house in a condition that endangers the safety of the public. But if the defects are due to the original faulty construction of the house, the landlord is alone liable. So, too, for injuries arising to adjoining owners therefrom (*Todd v. Flight*, 9 *C. B. [N. S.]* 377; *Rex v. Pedly*, 1 *Ad. & El.* 822; *Bellows v. Sackett*, 15 *Barb.* 96). Where the houses are in good repair when the tenant goes into possession, and become ruinous while in the tenant's possession, the tenant alone is liable for the consequences, public or private (*Payne v. Rodgers*, 2 *H. & Bl.* 349; *Leslie v. Pound*, 4 *Taunt.* 648; *Robbins v. Jones*, 33 *L. J. C. P.* 1; *Bishop v. Trustees*, 1 *Ell. & Ell.* 697; *Chauntler v. Robinson*, 4 *Exch.* 163).

In cases of negligence consisting of a mere omission of duty, where no affirmative fault, misfeasance or affirmative wrong was committed by the defendant, or is imputed to him, it is essential to sustain a recovery, to establish that the defendant owed some clear, specific legal duty to the party injured which was violated, and as between landlord and tenant, the law is well settled, that when there is no fraud or false representations, and in the absence of an express warranty or covenant to repair, there is no

implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use. The principle of *caveat emptor* applies to all contracts for the letting of property, real, personal, or mixed, as much as to contracts of sale, with one or two recognized exceptions; and when there is no covenant on the part of the lessor to repair the buildings upon the demised premises, he is not liable to respond in damages to a servant of the tenant, for injuries sustained by reason of a want of repairs, and when a lessor is under no obligation to repair the premises, and their condition is equally as well known to the tenant as to him, there is no basis for an action against him for negligence, by the tenant or any servant of his, or person standing in his place, arising from the fact that the premises were out of repair (*O'Brien v. Capwell*, 59 *Barb.* 497).

In respect to the necessity of averring that the defendant owed some specific legal duty to the party injured which has been violated, before any liability attaches to the defendant, the case of *Gillis v. The Pennsylvania Railroad Company* (8 *Am. Law. Reg. N. S.* 729), furnishes a striking illustration. The plaintiff in that action alleged that the defendants, being a corporation for conveying freight and passengers, and having the sole control of the passenger depots, platforms, &c., along the road for the mutual accommodation of themselves and the public, built a platform at the Johnstown Station, bridging a chasm over the bed of an abandoned canal, on which large numbers of people were in the habit of congregating, "as matter of general custom;" and that it was the duty of the defendant to construct the platform so as to make it safe and keep it in good repair; that it had come to the knowledge of the defendants that the timbers of the platform were rotten, and "insufficient to support a large multitude of people," but that they, notwithstanding, insufficiently

repaired it; that on the 14th of September, 1866, "on the occasion of the visit of Andrew Johnson, President, &c., and suite, to Johnstown." The defendants furnished a special train, and made a special time schedule for their accommodation, by which the train was required to stop a longer time than usual for passenger trains at Johnstown, &c., the company notifying the people at Johnstown and vicinity of the time of arrival and departure of the train at Johnstown, the stoppage being made by the direction of the defendants, to give the people an opportunity of receiving Mr. Johnson and hearing him; that it had been publicly made known that wherever Mr. Johnson and his company had stopped large numbers of people congregated, and thereupon it became the duty of the defendants "to have the platform aforesaid made sufficiently strong to bear and uphold as many people as might congregate thereon on the occasion aforesaid;" that the defendants knowing the insecure condition of the platform, did not use due diligence to have it made secure, but permitted and invited "a large multitude of people to congregate" thereon without notifying them or the plaintiff of its insecure condition; that the platform broke and precipitated the multitude with the plaintiff into the chasm, by which he was injured and wounded, and the Supreme Court of Pennsylvania held, "that the platform of the railroad company at its station or stopping-place was in no sense a public highway. That there was no dedication to public use as such. That it is a structure erected expressly for the accommodation of passengers arriving and departing in the train. That being unenclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so," and Judge SHARSWOOD, in delivering the opinion of the court, said: "That plaintiff may not have been technically a trespasser. The platform was open; and there was a general license to pass over it. But he was where he had no legal right to be. His pres-

ence there *was in no way connected with the purposes for which the platform was constructed*. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome the coming or speed a parting guest, it might very well be contended that he was there by the authority of defendants, as much as if he were actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. *As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it. As to all others, they were liable only for wanton or intentional injury.* The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that. I am bound to have the approach to my house sufficient for all visitors on business or otherwise; but if a crowd gathers upon it to witness a passing parade and it breaks down, though it may be shown not to have been sufficient even for its ordinary use, I am not liable to one of the crowd,—*I owe no duty to him*. If a traveller by foot, on the open track of a railroad, crosses a bridge which ought to be, but is not in its ordinary use, strong enough to bear a locomotive and train of cars, and a rotten board breaks down under him, the company are not liable to him, *for they owe him no duty*; and the court conclude by saying, that however much to be lamented was the sad occurrence which occasioned the suit, and however much sympathy may be felt for those who were injured, and the families of those who lost their lives, we are of the opinion that the circumstances of the case were not such as to cast any pecuniary responsibility on the railroad company, and a verdict for the defendants upon the direction of the court below was affirmed.

The mere agreement of a landlord to repair, has reference only to the condition of the premises demised

for the purpose of their profitable use, and in no way contemplates any destruction of life or property, which may accidentally result from an omission to fulfill the agreement, and a landlord under covenant to repair is liable only for a breach thereof, and a claim can not exist on the part of sufferers from defects to a piazza appurtenant to a tenement house, occurring from natural wear and tear, in an action for a tort or negligence against the landlord, whose only obligation exists in contract with the tenant in possession, and such claim can only be founded on some other negligence, trespass, or wilful breach of a direct public or private duty to the party injured (*Flynn v. Hatton*, 43 *How.* 333). In an action against a defendant, who was landlord, owner, and one of the occupants of a tenement house for damages, for injuries received by one of the tenant's visitors, it appeared that there was a stairway leading from the first floor to the cellar, through which the occupants of the house descended to the various portions of the cellar assigned to them, such stairway being immediately behind the stairway leading to the upper part of the building, and the open space at its entrance being provided with a trap-door, which, when shut, covered it, jutting out about two inches into the hallway, and rendering the aperture safe; but there were no other safeguards about its entrance, and a visitor to one of the occupants, in attempting to go upstairs, placed one foot on the ascending stairway, and the other in the space forming the entrance to the descending stairway, the same being open by reason of the trap-door not being shut, and thereby fell and sustained injuries; and it was held that (1) the defendant being both landlord and owner, and also an occupant, was not liable, it not appearing *either* that there was any defect or negligence in the construction of the stairway and its covering, *or* that when properly used it did not suffice to protect persons using the hallway, and was not all that reasonable care and prudence could suggest; *or* that defendant

left the trap-door open, or caused or allowed it to be left open ; and that (2) such landlord and owner is not bound to protect his tenants and their visitors from the consequences of their careless acts in the course of occupancy ; and that (3) the tenants are each liable for their respective negligence, and that in such case there is no presumption against any particular occupant (*Kaiser v. Hirth*, 36 *N. Y. Superior Court*, 345).

When a party is engaged in erecting a house upon his own ground, he is not, nor are his workmen, bound to put up temporary partitions about stairways nor floors across beams, nor use other means for the protection of intruders who voluntarily enter the unfinished house and venture to walk across the beams or around its well-holes, and where the owner of lots upon the rear of which were buildings occupied by his tenants, opens a way which they use for their ingress and egress through an adjoining lot, while he is improving the front of the lots by putting up buildings ; their visitors have no such license, as visitors, that they can aver a right to pass through the unfinished buildings. In such case, when the buildings in front are enclosed and even alley-ways, which the tenants in the rear begin to use, are arranged along the walls ; an obstruction of such alley-way does not give either the tenants or their visitors a right to pass through the house, and accordingly, where the father of two of the tenants, wishing to visit his daughters in the night season, and finding the alleys along the new houses obstructed, attempted to grope his way thorough the basement hall and fell down into the cellar, it was held, that he had acted at his peril, and could maintain for the injury received no action founded upon the negligence of the mechanics employed in the erection (*Roulston v. Clark*, 3 *E. D. S.* 367).

Openings on sidewalk.

Owners having coal-holes and such like openings

upon the sidewalk in front of their premises, are liable to persons injured thereby, whether such owners be in possession or not, upon the ground that they are nuisances upon the public highway (see *Anderson v. Dickie*, 1 *Robt.* 241 ; *Congreve v. Smith*, 18 *N. Y.* 79 ; *Same v. Mogan*, *Id.* 84 ; *Davenport v. Ruckman*, 37 *Id.* 568 ; *Mullen v. St. John*, 57 *Id.* 567). As to landlord's liability for injuries received from open hatchway, see *Totten v. Phipps*, 52 *N. Y.* 354 ; *Southcote v. Stanley*, 1 *Hurl. & Norm.* 247 ; *Godley v. Hagerty*, 20 *Penn. St.* 387 ; *Sherman & Redf. on Neg.* 508-9 ; *Karl v. Millard*, 3 *Bosw.* 591 ; *Freer v. Cameron*, 4 *Rich. (S. C.) L. Rep.* 228 ; *Carman v. Eastern Co. R. R. Co.* 4 *Hurl. & Norm.* 781 ; *Pickard v. Smith*, 10 *Com. Bench (N. S.)* 470 ; and see *ante*, page 110, as to further liability.

Liability of third person to landlord.

A landlord may maintain case against a third person for so disturbing his tenant's possession, with wrongful and malicious intent to injure the landlord, that the tenant was obliged to abandon possession, whereby the landlord lost his rent which he would otherwise have received, and the premises sustained injury and delapidation, by reason of remaining unoccupied during the remainder of the year (*Aldridge v. Stuyvesant*, 1 *Hall*, 210).

CHAPTER XX.

THE VARIOUS STATUTORY PROVISIONS RELATING TO
SUMMARY PROCEEDINGS TO RECOVER THE POS-
SESSION OF LAND IN CERTAIN CASES.

These provisions will be found in 2 *Edmonds' R. S.*, p. 523. Where amendments have been made they have been specially referred to. The original sections as they appear in the statute have been retained.

R. S., ARTICLE FIRST, Title X. of Chap. 8, Part 3.

Of forcible entries and detainers.

- SEC. 1. Entries on land to be peaceable, &c.
 2. Complaint of forcible entry, &c.
 3. To be in writing; affidavit therewith; precept for jury.
 4. Notice of precept, &c., to be served on defendant.
 5. Jury to be sworn; to inquire, &c., and return inquisition.
 6. Traverse of inquisition, when to stay proceedings.
 7. When and on what terms landlord may traverse inquisition.
 8. Jury to be summoned to try traverse.
 9. Jury to be sworn; proceedings before them, &c.
 10. When jury may be discharged, and new one summoned.
 11. Matters to be shown on trial by respective parties.
 12. Judgment, if defendant be found guilty.
 13. Process for restitution and collection of costs.
 14. To issue if there be no traverse within twenty-four hours.
 15. Sheriffs, &c., to execute process.
 16. Notice to jurors; fine for not attending; how collected, &c.
 17. Subpœna for witnesses; penalty for their neglect, &c.
 18. Certain officers to have jurisdiction.
 19. Certiorari to remove proceedings.
 20. Bond to be given before allowance of certiorari.
 21. Bond, how returned; proceedings of supreme court.
 22. When restitution to be awarded and bond prosecuted.
 23. Criminal courts may award restitution in certain cases.

Entries on land to be peaceable.

§ 1. No entry shall be made into any lands or other possessions, but in cases where entry is given by law; and in such case, only in a peaceable manner, not with strong hand, nor with multitude of people.

For the law and practice in proceedings of forcible entry and detainer, see Chapter XXII.

Complaint of forcible entry, &c.

§ 2. Where any such forcible entry shall be made, or where the entry shall be made in a peaceable manner, and the possession shall be held by force, the person so forcibly put out, or so forcibly holden out of possession, and the guardian of any such person being a minor, may be restored to such possession, by making a complaint to a judge of the county courts of the same county, and by such proceedings as are hereinafter directed (see § 18, at page 180, *post*).

To be in writing ; affidavit therewith ; precept for jury.

§ 3. Such complaint shall be in writing, and shall be accompanied by an affidavit of such forcible entry or forcible holding out, and that the complainant has an estate of freehold or for term of years in the premises, then subsisting, or some other right to the possession thereof, stating the same ; and the judge shall thereupon issue a precept to the sheriff or any constable of the county, commanding him to cause twenty-four inhabitants of the same county, duly qualified to serve as jurors, to come before such judge, at some time not less than two days thereafter, to inquire of such forcible entry, or such forcible holding.

Notice of precept, &c., to be served on defendant.

§ 4. Such judge shall immediately cause a notice, in writing, of the issuing of such precept, and of the time and place of the return thereof, to be served upon the party against whom such complaint is made, by delivering the same to such person ; or if he can not be found, by delivering such notice to some person of proper age on the premises ; or if there be no such person, by affixing the same on the front door of the house,

if there be one ; or if there be none, on some other public and suitable place on the premises.

Jury to be sworn ; to examine, &c., and return inquisition.

§ 5. At the day and place appointed for the return of the said precept, the judge shall administer an oath to the persons returned summoned, who shall appear, not being less than thirteen and not more than twenty-three, well and truly to inquire into the matters complained of, and a true inquisition thereof to make. And the jury so sworn, shall proceed to make inquiry into the forcible entry or the forcible holding complained of, and may examine witnesses on oath to be administered by such judge ; and shall make and sign their inquisition before the said judge, and deliver the same to him.

Traverse of inquisition ; when to stay proceedings.

§ 6. If by such inquisition, it shall be found that forcible entry, as aforesaid, was made, or that the entry being peaceable, the possession was forcibly kept, as aforesaid, the party complained against may traverse such inquisition, in writing, denying such forcible entry or forcible holding out, or alleging that he or his ancestors or those whose estate he has in such lands, have been in quiet possession thereof for the space of three whole years next before such inquisition found, and that his interest therein is not ended or determined ; and if the said traverser shall pay to such judge the fees of summoning a jury to try such traverse, and the jurors' and judge's fees on such trial, such traverse shall stay all further proceedings on such complaint and inquisition, until the same be tried.

When and on what terms landlord may traverse inquisition.

§ 7. If any person shall make affidavit before such judge, that the party complained against is the tenant

of such person, under a valid and then subsisting demise, he shall be permitted on payment of the fees specified in the last section, to traverse the said inquisition as landlord, in the same manner as is allowed to the party complained of, either with such party or without him.

Jury to be summoned to try traverse.

§ 8. Upon such traverse being made, either by the party complained against, or by his landlord, the judge shall issue a precept to the sheriff or any constable of the county, commanding him to summon twelve qualified jurors to come before such judge, at the place therein to be specified, at a time not less than four, nor more than eight days thereafter, to try the same traverse.

Jury to be sworn ; proceedings before them, &c.

§ 9. The jurors shall be summoned, returned, and impannelled, in the same manner as provided by law, in civil actions before justices of the peace, and shall be sworn by such judge, well and truly to hear, try and determine the said traverse ; they shall be kept together by such judge, and shall hear and examine any competent witnesses who may be offered, on oath, to be administered by such judge ; and after hearing the allegations and proofs of the parties, the jury shall be kept together until they agree on a verdict, by an officer, who shall be sworn, as is usual on trials in courts of record.

When jury may be discharged and new one summoned.

§ 10. If the jury can not agree, after being kept together for such time as such judge shall deem reasonable, he may discharge them, and issue a precept for a new jury ; and the same proceedings shall be had in respect to such new jury.

Matters to be shown on trial by respective parties.

§ 11. On the trial of such traverse, the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of a forcible entry, or was in the constructive possession of the premises at the time of a forcible holding out; and the traverser may show, in his defense, that he or his ancestor, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of three whole years together, next before the said inquisition found, and that his interest therein is not then ended or determined; and such showing shall be a bar to the prosecution.

Judgment if defendant be found guilty.

§ 12. The verdict of such jury shall be received and recorded by the said judge, and if the defendant is thereby found guilty, the said judge shall thereupon award restitution of the premises so forcibly entered or forcibly held out, and shall assess the costs and expenses of the proceedings.

Process for restitution and collection of costs.

§ 13. He shall thereupon issue his precept, reciting the proceedings before him, and commanding the sheriff of the county, or any constable thereof, to cause the complainant to be restored and put into full possession of the said premises, according as he was seized or possessed thereof before such entry; and shall also, in the same precept, or in separate execution, direct the costs and expenses so assessed, to be levied and collected of the defendant, in the same manner as costs are or may be collected on judgments before justices of the peace, in personal actions.

To issue if there be no traverse within twenty-four hours.

§ 14. If no such traverse shall be made, as authorized in the preceding sections of this title, in the manner therein specified, within twenty-four hours after the inquisition found, the judge shall, in like manner, award restitution of the premises, and assess the costs and expenses of the proceedings ; and shall issue his precept, in the same manner, to cause restitution, and for the collection of the costs.

Sheriffs, &c., to execute process.

§ 15. Sheriffs and constables, to whom any process issued by a judge, as herein authorized, shall be directed and delivered, shall execute the same, and if need be, shall command and take the power of the county for that purpose.

Notice to jurors ; fine for not attending, how collected, &c.

§ 16. Twenty-four hours' personal notice to any juror to attend upon any precept issued as aforesaid, shall be deemed sufficient service, and any person so summoned, who shall neglect to attend and serve as such juror, without reasonable excuse, to be allowed by the judge issuing such precept, shall be subject to the same fine, to be prosecuted for, collected and applied to the same use, as provided by law in respect to jurors in justices' courts.

Subpœnas for witnesses ; penalty for their neglect, &c.

§ 17. The judge before whom such complaint shall be made, may, at the request of either party, issue his subpœna requiring any person to appear and testify before him, or before the jury of inquiry, or before the petit jury, touching the matters hereinbefore directed to

be heard by them. And any person served with such subpoena, who, without reasonable cause, shall neglect to appear, or appearing, shall refuse to answer upon oath, touching the matters aforesaid, shall be subject to the proceedings and penalties prescribed by law in similar cases in justices' courts.

Certain officers to have jurisdiction.

§ 18. Every justice of the Supreme Court, and every mayor, recorder and alderman of any city, any special justice, any justice of the Marine Court, and any justice of the Justices' Court of the city of New York, shall have the like powers and authority, respecting forcible entries or forcible detainers, in their respective cities or counties, as are above given to judges of the county courts.

Certiorari to remove proceedings.

§ 19. No proceeding for the restitution of any premises forcibly entered or forcibly detained, had according to the foregoing provisions, shall be removed by any *certiorari*, unless the same be allowed by a justice of the Supreme Court.

Bond to be given before allowance of certiorari.

§ 20. No such writ of *certiorari* shall be allowed by such officer, unless the defendant prosecuting such writ, with two sufficient sureties to be approved by such officer, or in case of the absence of such defendant, three sufficient sureties, to be approved as aforesaid, shall become bound to the complainant, in such penal sum as such officer shall direct, not less than one hundred dollars, conditioned that such party will appear at the return of the said *certiorari*, answer to the inquisition found, abide such order and judgment as the Supreme Court shall make in the premises, and pay all costs that

shall be awarded against such defendant. Such bond shall be delivered to the judge to whom such *certiorari* shall be directed, and until the same be so delivered, such *certiorari* shall be of no effect.

Bond, how returned ; proceeding of Supreme Court.

§ 21. The judge shall annex and file such bond, with his return to such writ, and the Supreme Court shall proceed therein, and cause the defendant to traverse the inquisition, if no traverse has been had, and shall direct a trial.

When restitution to be awarded and bond prosecuted.

§ 22. If the defendant shall omit to traverse such inquisition, within such time as the court, by rule, shall direct, restitution shall be awarded by the court, with costs. And if, upon the trial of such traverse, the defendant be found guilty, the Supreme Court shall also award restitution, with costs ; and in either case, the court may authorize the complainant to prosecute the bond given, on the allowance of the writ of *certiorari*.

Criminal Courts may award restitution in certain cases.

§ 23. Upon the conviction of a defendant upon any indictment for forcible entry or forcible detainer, found in any court of General Sessions of the Peace, or in any court of Oyer and Terminer, such court may award restitution, in the same manner as a judge upon a verdict being rendered before him, as herein provided.

CHAPTER XXI.

THE VARIOUS STATUTORY PROVISIONS RELATING TO
SUMMARY PROCEEDINGS TO RECOVER THE POSSES-
SION OF LAND IN CERTAIN CASES—*Continued.*

R. S., ARTICLE SECOND, Title X. of Chap. 8, Part 3.

*Summary proceedings to recover the possession of
land in other cases.*

[These proceedings will be found in 2 *Edm. R. S.* p. 527. The original sections as they appear in the statute have been retained, and where amendments have been made they have been specially noted.]

- SEC. 24. When justice to view deserted premises and give notice to tenant.
- 25. When landlord to be put in possession; effect thereof.
 - 26. Appeal by tenant, how and when made; return by justice.
 - 27. Power of county court; to award restitution and costs, &c.
 - 28. Cases in which certain tenants may be removed.
 - 29. Affidavit of facts to be made.
 - 30. Summons to tenant when to be issued; its contents.
 - 31. Proof required in certain cases before granting summons.
 - 32. Summons, how to be served.
 - 33. If no cause shown, warrant of possession to issue.
 - 34. Tenant, &c., may by affidavit deny facts alleged.
 - 35. Proceedings to form jury to try facts controverted.
 - 36. Jury, how drawn and sworn.
 - 37 & 38. How kept; when discharged, and new one formed.
 - 39 & 40. When warrant of possession to issue; how executed.
 - 41. When adjournment may be had; for what time.
 - 42. Witnesses, how compelled to attend and testify.
 - 43. Agreement, &c., between parties annulled by warrant.
 - 44. How warrant in case of rent may be stayed.
 - 45. How stayed where tenant has taken benefit of act.
 - 46. Also when premises have been sold under execution.
 - 47. Proceedings may be removed by *certiorari*; but not stayed.
 - 48. When Supreme Court to award restitution and costs.
 - 49. Costs, by whom paid; damages, when to be recovered.
 - 50. Rights of landlords and tenants not to be affected.
 - 51. Judgment in proceedings before a justice; costs.
 - 52. The proceedings may be removed to county court by appeal.
 - 53. Appeal not to be allowed unless security be given.
 - 54. Rights of lessees and mortgagees to redeem.

When justice to view deserted premises.

§ 24. If any tenant being in arrear for rent, shall desert the demised premises, and leave the same unoccupied and uncultivated, without any goods thereon subject to distress to satisfy the arrears of rent, any justice of the peace of the county may, at the request of the landlord, and upon due proof that the premises have been so deserted, leaving such rent in arrear and no goods thereon subject to distress, go upon and view the said premises; and upon being satisfied upon such view, that the premises have been so deserted, he shall affix a notice in writing upon a conspicuous part of the premises, requiring the tenant to appear and pay the rent due, at some time in the said notice specified, not less than five, nor more than twenty days after the date thereof.

When landlord to be put in possession; effect thereof.

§ 25. At the time specified in such notice, the justice shall again view the premises; if the tenant appear and deny that any rent is due to the landlord, all proceedings shall cease. If upon such second view, the tenant, or some one for him, shall not appear and pay the rent in arrear, and there shall not be sufficient distress on the premises to satisfy such rent, then such justice may put the landlord into possession of the said demised premises; and any demise of the said premises to such tenant, shall from thenceforth become void.

Appeal by tenant, how and when made. Return by Justice.

§ 26. An appeal from the proceedings of any justice in such case, may be made by the tenant at any time within three months after such possession delivered, to the county court* of the county, by serving notice in writing thereof upon such justice, and by giving secu-

* "County court" substituted for "Court of Common Pleas." See titles "Review by appeal," *post*, and "*Certiorari*," *post*.

urity to be approved by such justice, to pay to the landlord all costs of such appeal which may be adjudged against such tenant ; and thereupon such justice shall return the proceedings had before him to the said court, within ten days after such notice and security given, and shall give notice to the landlord of such appeal.

Power of County Court to award restitution, costs, &c.

§ 27. The county court* shall examine the proceedings, and hear the proofs and allegations of the parties, in a summary way ; and may order restitution to be made to such tenant, with costs to be paid by the landlord ; or in case of affirming such proceedings may award costs against the tenant.

Cases in which certain tenants may be removed.

§ 28. Any tenant or lessee at will, or at sufferance, or for any part of a year, or for one or more years, of any houses, lands or tenements ; and the assigns, under-tenants, or legal representatives of such tenant or lessee may be removed from such premises, by any judge of the county courts of the county, or by any justice of the peace of the city or town where the premises are situated, or by any mayor or recorder of the city, where such premises are situated ; or in the city of New York, by the mayor, recorder, any justice of the Marine Court, or any one of the justices of the Justices' Courts of the city of New York, in the manner hereinafter prescribed, in the following cases :

1. Where such person shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord.

2. Where such person shall hold over without such permission as aforesaid, after any default in the payment of rent, pursuant to the agreement under which

* " County court " substituted for " Court of Common Pleas."

such premises are held, and a demand of such rent shall have been made, or three days' notice, in writing, requiring the payment of such rent, or the possession of the premises, shall have been served by the person entitled to such rent, on the person owing the same, in the manner prescribed for the service of the summons in the thirty-second section of this title.

3. Where the tenant or lessee of a term of three years, or less, shall have taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment during such term.

4. Where any person shall hold over and continue in possession of any real estate which shall have been sold pursuant to the foreclosure of a mortgage thereon, or by virtue of an execution against such person, after a title under such sale shall have been perfected (*as amended by Laws 1874, chapter 208*).

5. When any person shall hold over and continue in possession of any real estate occupied or held by him under an agreement with the owner to occupy and cultivate the same upon shares or for a share of the crops, after the expiration of the time fixed in the agreement for such occupancy, without the permission of the other party to said agreement, his heirs, or assigns (*as amended by Laws 1874, chapter 471*).

For the Law and Practice on Summary Proceedings, see chap. 23.

Jurisdiction of the district court justices.

Prior to April 20, 1863, the jurisdiction of the justices of the district courts, in a territorial point of view extended over the whole city and was not limited to the district in which the parties resided or the premises were situated (*Roach v. Cosine*, 9 *Wend.* 227; *Carlisle v. McCall*, 1 *Hilt.* 399). The proceeding was regarded as a proceeding before the magistrate out of court, and the act of 1857 (chap. 344 § 77), recognized the distinctive powers of these magistrates as officers out of court, by referring to these powers as peculiar to the justice, whereas the other judicial powers pertained generally to his court. The act of 1863 (chap. 189 p. 328), effected a great change in this respect. That act provides that "all proceedings had and process issued under the provisions of article two, title ten, chapter eight, part third of the Revised Statutes, in the city of New York, by any justice of the district courts thereof, shall be had and issued and be made

returnable before a justice of the district court in the districts in which the premises of which possession is sought to be recovered are situated, and all such process shall be made returnable by the clerk of said district court, at the court thereof, and the affidavit upon which the process is issued shall be sworn or affirmed to before, and filed with the said clerk or his deputy.

The provisions of this act were changed by an amendment to section 66 of the Code, passed in 1870 (chap. 741, § 4), which amendment reads as follows: "The district courts of the city of New York shall have such jurisdiction as is provided by special statutes; and proceedings under article two, of title ten, of chapter eight, of part three, of the Revised Statutes, may be had before any justice of such courts, without regard to the district in which the premises are situated; and the affidavits used in such proceedings may be taken before any officer authorized by law to take affidavits."

This last amendment is constitutional (58 *N. Y.* 323).

Keeper of Poor-House,

May be removed under summary proceedings (1862, ch. 298).

Lessees under tax sales.

This remedy extended to lessees of corporation of Brooklyn (1850, p. 285, § 40).

Affidavit of facts to be made.

§ 29. Any landlord or lessor, his legal representatives, agents or assigns, may make oath in writing, of the facts, which, according to the preceding section, authorized the removal of a tenant, describing therein the premises claimed; and may present the same to one of the officers in the last section specified.

Summons to tenant, when to be issued; its contents.

§ 30. On receiving such affidavit, such officer shall issue his summons, describing the premises of which possession is claimed, and requiring any person in possession of the said premises, or claiming the possession thereof, forthwith to remove from the same; or to show cause, before the said magistrate, within such time as shall appear reasonable, not less than three nor more than five days, why possession of the said premises should not be delivered to such applicant; provided, however, that in the cases where a person continues in

possession of the demised premises, after the expiration of his term, without the permission of his landlord, the magistrate, if the summons be issued on the day the term expires, or on the day next thereafter, may direct such summons to be made returnable on the same day, at any time after twelve o'clock noon, and before six o'clock in the afternoon (*as amended* 1868, chap. 828).

Proof required in certain cases before granting summons.

§ 31. Previous to issuing such summons in the case of a tenancy at will or at sufferance, the magistrate shall be satisfied, by affidavit, that such tenancy has been terminated by giving notice in the manner prescribed by law. And if application be made for such summons to be served on any person holding over real estate which shall have been sold on execution, the magistrate shall in like manner be satisfied that a demand of the possession of such premises has been made.

Summons, how to be served.

§ 32. Such summons shall be served, either,

1. By delivering to the tenant to whom it shall be directed, a true copy thereof, and at the same time showing him the original ; or,

2. If such tenant be absent from his place of residence, and such place is in the city or town in which the demised premises are situated, by leaving a copy thereof at such place with some person of mature age residing on the premises ; or,

3. If no such person can be found at such place, or if such place is not in the same city or town with the demised premises, and the tenant can not be found upon the demised premises, by leaving a copy thereof at the demised premises, with some person of mature age residing thereon ; or, if there be no such person residing thereon, with some person of mature age connected

with the demised premises, by employment in any business for which the premises are used ; or, if no person residing or employed on the demised premises can be found thereon, then such service may be made by affixing such copy upon a conspicuous part of said demised premises. If the summons be returnable on the day on which it is issued, it shall be served at least two hours before the hour at which it is made returnable, and if not returnable on the same day, it shall be served at least two days before the day on which it is made returnable. The proof of the service of the summons shall state particularly the exact time, place and manner of service, including the name of the person on whom the service was made, if it can be ascertained.

§ 3.* It shall be the duty of every person to whom a copy of a summons shall be delivered, in pursuance of subdivision two or three of section thirty-two of title ten, chapter eight, part three of the Revised Statutes, to deliver such copy to the tenant to whom the same is directed, or, if such tenant can not be found, to his agent for the demised premises, without any avoidable delay ; and a copy of this section shall be written or printed upon the outside of every such copy. If neither the tenant nor his agent can be found for that purpose, then the person to whom such copy is delivered, shall take the same to the magistrate by whom the summons is issued, at the time and place named therein, and inform him that the tenant can not be found. Every person who shall wilfully violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by imprisonment for not less than thirty days, nor more than one year (*as amended by Laws 1868, chap. 828*).

If no cause shown warrant of possession to issue.

§ 33. If at the time appointed in the said summons, no sufficient cause be shown to the contrary, and due

* So in the original act.

proof of the service of such summons be made to such magistrate, he shall thereupon issue his warrant to the sheriff of the county, or to any constable or marshal of the city or town where the premises are situated, commanding him to remove all persons from the said premises, and to put the said applicant to such magistrate into the full possession thereof.

Tenant, &c., may by affidavit deny the facts alleged.

§ 34. Any person in possession of such demised premises, or any person claiming possession thereof, may, at the time appointed in such summons for showing cause, file an affidavit with the magistrate who issued the same, denying the facts upon which the said summons was issued, or any of those facts ; and the matters thus controverted, shall be tried by the magistrate or by a jury, provided either party to such proceeding shall at the time designated in such summons for showing cause, demand a jury, and at the time of such demand, pay to such magistrate the necessary costs and expenses of obtaining such jury (*as amended 1857, chap. 684*).

Proceedings to form jury to try facts controverted.

§ 35. In order to form such jury, the magistrate with whom such affidavit shall be filed, shall nominate twelve reputable persons, qualified to serve as jurors in courts of record ; and shall issue his precept, directed to the sheriff, or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated to appear before such magistrate, at such time and place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference.

Jury, how drawn and sworn.

§ 36. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such magistrate, well and truly to hear, try, and determine the matters in difference between the parties.

Whenever a sufficient number of jurors duly drawn and summoned, do not appear, or can not be obtained to form a jury, the magistrate may order any sheriff, constable, or marshal to summon from the bystanders or from the county at large, so many persons qualified to serve as jurors as shall be sufficient, and return their names to the magistrate. Every person so summoned, or summoned under the provisions of this article as hereby amended, shall attend forthwith and serve as a juror, unless excused by the magistrate; and for every neglect or refusal so to attend, shall be subject to fine by said magistrate in the same manner as is now provided by law in the case of jurors in courts of record (*as amended by Laws 1862, chapter 368*).

Jury, how kept.

§ 37. After hearing the allegations and proofs of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the magistrate for that purpose, who shall be sworn to keep such jury as is usual in like cases of courts of record.

Jury, when discharged and new one formed.

§ 38. If such jury can not agree, after being kept together for such time as such magistrate shall deem reasonable, he may discharge them, and nominate a new jury, and issue a new precept in manner aforesaid.

When warrant of possession to issue.

§ 39. If the decision of the magistrate or the verdict of the jury, shall be in favor of the lessor or landlord, or the other person claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff, or to any constable of the county, in which the premises are situated, commanding such officer to put such landlord, lessor or other person, into possession, as hereinbefore directed (*as amended by Laws 1857, chapter 684, § 3*).

Warrant, how executed.

§ 40. The officer to whom such warrant for delivering possession shall be directed and delivered, in either of the cases aforesaid, is hereby required to execute the same according to the tenor thereof.

When adjournment may be had. For what time.

§ 41. Any magistrate before whom such application may be pending, may, upon the request of either party, adjourn the hearing of such application, for the purpose of enabling such party to procure his witnesses whenever it shall appear to be necessary ; but such adjournment shall in no case exceed ten days.

Witnesses, how compelled to attend and testify.

§ 42. Any magistrate before whom such application may be pending, may, at the request of either party, issue his subpoena, requiring any person to appear and testify before such magistrate, or before the jury, touching the matters herein directed to be heard by them ; and every person who, being served with such subpoena, shall, without reasonable cause, refuse or neglect to appear ; or appearing, shall refuse to answer upon oath, touching the matters aforesaid ; shall be subject to the proceedings and penalties provided by law in similar cases.

Agreement, &c., annulled by warrant.

§ 43. Whenever a warrant shall be issued as aforesaid, by any such magistrate, for the removal of any tenant, from any demised premises, the contract or agreement for the use of the premises, if any such exists, and the relation of landlord and tenant between the parties, shall be deemed to be cancelled and annulled.

How warrant in case of rent to be stayed.

§ 44. The issuing of such warrant of removal shall be stayed in the case of a proceeding for the non-payment of rent, if the person owing such rent shall, before such warrant be actually issued, pay the rent due, and all the costs and charges of the proceedings; or give such security as shall be satisfactory to the said magistrate, to the person entitled to such rent, for the payment thereof, and the costs aforesaid, in ten days. And in case the person giving such security shall not within the said ten days produce to the magistrate satisfactory evidence of the payment of the rent and costs, the warrant of removal may at any time thereafter be issued.

How stayed where the tenant has taken benefit of act.

§ 45. When the application to a magistrate is founded on the fact, that the tenant or lessee has taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment, the proceedings shall be stayed, if at any time before issuing the warrant for removal, the tenant, or lessee, or his assignee shall pay the costs of such proceedings as have been had, and give such security to the person entitled to the rent, for the payment thereof, as it shall become due, as shall be satisfactory to the magistrate.

Also where the premises have been sold under execution.

§ 46. When such application is founded upon an alleged sale, by execution, of the premises occupied by the defendant in such execution, the proceedings shall be stayed, if at any time before issuing the warrant of removal, the occupant shall,

1. Pay the costs of such proceedings :

2. File with the officer before whom the application is pending, an affidavit that he claims the possession of such premises by virtue of some title or right acquired after such premises were sold, or as guardian or trustee for any other : and,

3. Execute a bond to the applicant for such warrant, in such penalty and with such sureties as the magistrate shall approve, conditioned to pay the costs which may be recovered against him in any ejectment that may be brought by such applicant within six months, for the recovery of the possession of such premises ; and to pay the value of the use and occupation of such premises, from the date of such bond to the time such applicant shall obtain possession of the same by virtue of a recovery in such action of ejectment ; and also conditioned not to commit any waste or injury to such premises, during his occupation thereof.

Proceedings may be removed by certiorari, but not stayed.

§ 47. The Supreme Court may award a *certiorari* for the purpose of examining any adjudication made, on any application hereby authorized ; but the proceedings on any such application shall not be stayed or suspended by such writ of *certiorari*, or any other writ or order of any court or officer. The judgment of the Supreme Court, at a general term, upon such *certiorari*, shall be final, unless an appeal shall be allowed by the said court, at a general term, before the end of the term next after that at which the judgment was rendered. The appeal, upon any judgment ren-

dered upon any such *certiorari*, may be brought on for argument as a preferred cause, at any term of the Court of Appeals, by either party, upon fourteen days' notice.

Nothing contained in this act shall prevent an appeal to the Court of Appeals, from any judgment heretofore rendered by the Supreme Court upon a *certiorari* awarded pursuant to section forty-seven, title ten, chapter eight, part three of the Revised Statutes, provided that such appeal has already been taken, or shall be taken, within one year from and after the passage of this act; and any writ of error or appeal from any such judgment, heretofore rendered, may be brought on for argument as provided in and by the said section as hereby amended (*as amended by Laws 1868, chapter 828*).

When Supreme Court to award restitution, &c.; costs.

§ 48. Whenever any such proceedings brought before the Supreme Court by *certiorari*, shall be reversed, or quashed, the court may award restitution to the party injured, with costs; and may make such orders and rules, and issue such process, as may be necessary to carry their judgment into effect.

Costs, by whom paid. Damages, by whom to be recovered.

§ 49. In all cases of an application pursuant to the provisions of this article, the prevailing party shall recover costs, and may maintain an action for the recovery thereof; and if the proceedings shall be reversed or quashed by the Supreme Court, the tenant or lessee may recover against the person making application for such removal, any damages he may have sustained by reason of such proceedings, with costs, in an action on the case.

Rights of landlords and tenants not to be affected.

§ 50. Nothing contained in this title shall be con-

strued to impair the rights of any landlord or lessor, or of any tenant, in any case not herein provided for.

Judgments and proceedings before a justice ; costs.

§ 51. In case of proceedings before a justice of the peace under this article, the justice shall enter the findings of the jury, or in case no jury is called under the foregoing provisions, his final decision upon said application for such warrant, in his docket, and render judgment therefor, and include in such judgment, costs of such proceeding to the prevailing party at the same rate of fees now allowed by law in civil actions in courts of justices of the peace, and limited in like manner, and in the warrant for delivery of possessions, or by execution issued by him, the justice shall direct the collection of such costs.

As to the remedy by appeal from proceedings before justice of the peace, see chapter 36, *post*.

Proceedings may be removed to county court by appeal.

§ 52. The proceedings before such justice may be removed by appeal to the county court of the county, in the same manner, and with the like effect, and upon like security, as appeals from the judgment of justices of the peace in civil actions, except that the decision of such county judge shall be an affirmance or reversal of such judgment and be final. But in addition to the security for such judgment as required by law in case of such appeal, in order to stay the issuing of such warrant or execution, there shall in case of appeal by the tenant be security also given for the payment of all rent accruing or to accrue upon said premises subsequent to the said application to such justice.

Appeal not to be allowed unless security be given.

§ 53. No appeal shall under this act be allowed, unless such security for said judgment shall be given

and approved by the judge, at the time of allowing such appeal, and served on the justice with the affidavit for appeal.

Rights of lessees and mortgagees to redeem.

§ 54. In case of proceedings under the second subdivision of section twenty-eight, title ten, chapter eight of the third part of the Revised Statutes, if the unexpired term of the lease under which the premises are held, exceeds five years at the time of issuing the warrant upon such proceedings, the lessee, his assigns, or personal representatives, may at any time within one year after possession of the demised premises shall have been delivered to the landlord, pay or tender to the lessor, his representatives or attorney, or to the officer who issued the warrant, all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlord—and in such case the premises shall be restored to the lessee, who shall hold and enjoy the same without any new lease thereof according to the terms of the original demise; and any mortgagee of the lease, or of any part thereof, who shall not be in possession of the demised premises, or any judgment creditor of the lessee who shall within one year after the execution of such warrant pay all rent in arrear, all costs and charges as aforesaid, and perform all the agreements which ought to be performed by the first lessee, shall not be affected by such recovery; and such judgment creditor may file a suggestion of such payment upon the record, and may issue execution for the amount of the original judgment and of such payment (1842, chap. 240, § 1, 3 *R. S. 5th* [*Banks'*] *ed.* 840).

§§ 55 to 64 were added to this statute by what is commonly called the Bawdy-house act (1868, chap. 764). These provisions will be found in full in chapter 34, *post*.

CHAPTER XXII.

THE LAW AND PRACTICE ON PROCEEDINGS FOR FORCIBLE ENTRIES AND DETAINERS.

At common law, if a man had a right of entry in him, he was permitted to enter by force and arms, and to detain his possession by force, where his entry was lawful. This created great inconvenience by arming the tenants of the lords, and encouraging them in mischief and rebellious contentions. It also gave opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbors. The legislature finding it necessary to interfere, enacted statutes from time to time, regulating these conflicting interests, by punishing those guilty of forcible entries and detainers, and furnishing a remedy for restitution to those whose possessions were invaded and detained (*Bac. Abr.*, title "Forcible Entry and Detainer").

These old acts were almost literally copied into our statute (1 *R. L.* 96); their provisions being intricate and unsuitable for the purpose intended, the present statute of this state, which went into effect January 1, 1830, was passed. This statute provides that no entry shall be made into any lands or other possessions, but in the cases where entry is given by law; and in such case, only in a peaceable manner, not with strong arm, nor with a multitude of people, and a forcible entry or detainer is committed by violently taking or keeping possession of lands and tenements with a strong arm or a multitude of people, with unusual weapons, personal violence or acts tending thereto, or such threats or menaces of life or limb, or such gestures or other circumstances as may give reason to apprehend personal injury or danger in standing in defense of one's posses-

sion, something more than a mere trespass upon the property is necessary (*The People v. Smith*, 24 *Barb.* 16; *People v. Field*, 52 *Id.* 198; *Wood v. Phillips*, 43 *N. Y.* 152; *Porter v. The People*, 7 *How.* 441); and the same circumstance of violence or terror which will constitute a forcible entry, will amount to a forcible detainer, and threats may be sufficient to constitute either (*The People v. Rickert*, 8 *Cow.* 226), but the mere breaking of the lock of an outhouse is insufficient (*Willard v. Warren*, 17 *Wend.* 257).

Under this statute, if a landlord enter with force to distrain for rent; or if, upon the expiration of the tenant's interest, the landlord enter upon him and disposses him with a strong hand; the landlord will, in either case, subject himself to answer criminally for forcible entry (*Comyn's L. & T.*, 2d ed. p. 585), and civilly to an action for damages (*Flaherty v. Andrews*, 2 *E. D. S.* 529; *Shannon v. Burr*, 1 *Hill.* 39); at common law an indictment will lie for a forcible entry and detainer, on the ground of a violation of the public peace; and upon conviction upon any such indictment, the court may award restitution in the same manner as a judge, upon a verdict being rendered before him (*vide* § 23 of the statute, at p. 181, *ante*, and 8 *Cow.* 226); and by statute, an action of trespass is authorized, besides the remedy by summary proceedings (2 *Edm.* p. 349, § 4). The statute of forcible entry and detainer was originally strictly a criminal proceeding, and though it has been subsequently enlarged so as to embrace to a certain extent a civil remedy, the form of proceeding and the rules of law which govern it remain to a great decree unchanged (*Wood v. Phillips*, 43 *N. Y.* 152).

Officers having jurisdiction of said proceedings.

The officers authorized by the statute to entertain these proceedings, are the judges of the county courts of the same county in which the entry or detainer is

made (§ 2 of statute, *vide* p. 175). Also the justices of the Supreme Court, the mayor, recorder, or aldermen of any city, within the limits of their cities, the judges of the court of Common Pleas, the city judge, and any justice of the district court of the city of New York, are clothed with like powers as the county judges (§ 18 of statute, *vide* p. 180; *Const. of* 1846, art. 14, § 8; *Laws* 1848, chap. 153, §§ 3, 4; *Id.* chap. 276, § 1; 1850, chap. 205; 1852, chap. 324; 6 *Abb.* 144). Likewise the justices of the Superior Court of the city of Buffalo, within that city (1857, chap. 361, §§ 6, 25); and the city judges of Brooklyn within the county of Kings (1849, chap. 125, § 26; 1870, chap. 470, § 13).

The Marine Court Justices were deprived of this jurisdiction by Laws 1870, chap. 582, § 5.

Quere. Does the act of 1857, chap. 344, § 77, defining the powers of the District Court justices and repealing inconsistent acts (§ 81) take this jurisdiction away from them.

Proceedings, how instituted, and by whom.

The proceedings must be instituted by the person forcibly put out, or forcibly held out of possession, or the guardian of any such person being a minor, and must be prosecuted in the name of the party whose legal right of possession has been invaded (*The People v. Fulton*, 11 *N. Y.* 94). A mere intruder can not maintain the proceeding, but every person lawfully in possession, and having some right to the possession, and forcibly excluded therefrom, is entitled to the benefit of the statute (*The People v. Reed*, 11 *Wend.* 157; § 3 of the statute, *vide* p. 175, *ante*); but one tenant in common can not maintain a proceeding of this kind against his co-tenant (*King v. Phillips*, 1 *Lans.* 421). The proceeding is instituted by a complaint in writing, accompanied by an affidavit of the forcible entry or forcible holding out, and must set out the particular estate and right of possession of the complainant. If

the complaint is verified by affidavit, no other affidavit is necessary, and the complaint will be regarded both as a complaint and an affidavit (*Porter v. The People*, 7 *How.* 441 ; *People v. Fulton*, 11 *N. Y.* 96). The mere allegation of the complainant's right of possession, without stating the right is a mere legal conclusion, and the plaintiff, upon motion, should be dismissed for the defect (*The People v. Field*, 52 *Barb.* 198) ; but unless the objection is taken before the officer entertaining the complaint previous to the taking of the inquisition, it can not be raised afterwards (*The People v. Reed*, 11 *Wend.* 157 ; *People v. Field*, 58 *Barb.* 270 ; 24 *Id.* 16 ; 20 *Wend.* 207).

Complaint for forcible entry and detainer.

Before Hon. Justice of the Court.

THE PEOPLE <i>ex rel.</i> JOHN DOE,	}
Complainant,	
<i>v.</i>	
RICHARD DOE,	}
Defendant.	

To Hon. Justice of the Court of
 The complaint of John Doe of in said county shows: That Richard Roe of in said county, on the day of 187 , did, unlawfully make a forcible entry (describing fully the facts), into the lands and premises of this complainant, to wit: All, &c. (describe premises particularly), and that the said R. R. did then and there violently, forcibly, and unlawfully, and with strong hand, eject and expel this complainant from his said lands and premises (or hold this complainant out of possession of his said lands and premises).

And the said complainant further shows: That he had at the time aforesaid, an estate of freehold (or for a term of years in the premises, stating fully the nature and extent of the right of possession), and that the said Richard Roe still unlawfully and forcibly holds and detains the said lands and premises from the said John Doe, against the form of the statute in such case made and provided.

Dated this day of 187 .

JOHN DOE.

(If the complaint is verified by affidavit, no other affidavit is necessary; if not so verified, annex to the complaint an affidavit in the following form.)

TITLE OF PROCEEDING.

City and County of New York, ss.:

John Doe of said city being duly sworn says: That he is the complainant above named. That Richard Roe of the city and county of New York, on the day of 187 , did unlawfully make a forcible entry (describe fully the facts), into the lands and premises of this complainant, to wit: (here describe premises), and that the said Richard Roe, did then and there violently, forcibly, and unlawfully, and with strong hand, eject and expel this complainant from his said lands and premises (or did hold this complainant out of his said lands and premises), and that at the time aforesaid this complainant had an estate of freehold (or other right of possession or occupancy, setting forth its nature and extent), and that the said Richard Roe still unlawfully and forcibly holds and detains the lands and premises of deponent contrary to and against the form of the statute in such case made and provided.

JOHN DOE.

Sworn to before me this }
day of 187 . }

This complaint and affidavit are filed with the officer before whom the proceedings are instituted, who thereupon issues his precept for a jury as required by section 3 of the act (*vide* page 175, *ante*), and immediately causes a notice in writing of the time and place of the return of said precept according to section 4 of the act (*Id.*) to be served upon the party against whom the complaint is made in the manner specified in said section. The following is the form of precept for the jury, and the form succeeding that is the notice of precept, and is the only notice served upon the defendant upon the commencement of the proceedings:

Precept for jury.

TITLE OF PROCEEDING.

The People of the State of New York, to the sheriff or any constable of the City and County of New York, Greeting:

You are hereby commanded to cause to come before me, at my office at the court house, city hall, in the City of New York, on the day of 187 , at 11 o'clock in the forenoon of that day, twenty-four inhabitants of the said county, duly qualified by law to serve as jurors, to inquire upon their oaths for the said people of a certain forcible entry made by Richard Roe, as it is said, into the lands and premises of John Doe, in the city and county of New York (or certain forcible holding out of possession of John Doe by one Richard Roe of the lands and premises of the said John Doe; situated in New York city and county aforesaid), against the form of the statute in such case made and provided.

Given under my hand, this day of 1875.
Justice.

• Notice to the defendant. •

TITLE OF PROCEEDING.

To Richard Roe of the city and county of New York:

On the complaint of John Doe of said city and county, accompanied by an affidavit, duly verifying the same, made to the undersigned justice of _____, that you did on the _____ day of 187____, unlawfully make a forcible entry (or did make entry in a forcible manner) into the lands and premises of the said John Doe, situate in _____ aforesaid to wit: (Here describe premises) and that you did violently, forcibly, unlawfully and with strong hand eject and expel the said John Doe from his said lands and premises (or hold the said John Doe out of possession of his said lands and premises) and that you do still unlawfully and forcibly hold and detain the said lands and premises from the said John Doe and that at the time aforesaid the said John Doe had an estate of freehold (or other estate) in the said lands and premises then and still subsisting in the same.

You will, therefore, take notice that I have this day issued my precept, directed to the sheriff (or any constable) of said county, commanding him to cause to come before me, at my office at the court house, in the city and county of New York, on the _____ day of 187____, at 11 o'clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law to serve as jurors to inquire upon their oaths, of the forcible entry (or forcible holding out) aforesaid.

Justice.

After the service of this notice upon the defendant, a duplicate or copy must be returned to the justice with the following affidavit of service thereon:

City and County of New York, ss.:

J. H. McC., of said city being duly sworn, says: That on the _____ day of _____ 187____, he served upon Richard Roe, of said city and county, a notice of which the annexed is a copy, by delivering the same to him personally (*or*, by delivering the same to E. F. the wife of the said Richard Roe) on the premises described in said notice; and that such service could not be made upon the said Richard Roe, for the reason that after diligent inquiry he could not be found (*or*, by affixing the same to the front door of the house on the premises described in said notice, there being no person of proper age on the premises, and that such service could not be made upon the said Richard Roe, for the reason that after diligent inquiry he could not be found).

J. H. McC.

Sworn to before me, this _____ }
day of _____, 187____. }
As to this form, see § 4 at p. 175, *ante*.

The sheriff or constable executing the precept must make his return thereto, showing that he has caused twenty-four inhabitants of the county, naming them, qualified to serve as jurors to appear before the justice enter-

taining the proceedings; these jurors are thereupon called and the justice is required to administer an oath to such of the persons returned summoned, as shall appear, not being less than thirteen nor more than twenty-three, well and truly to inquire into the matters complained of, and a true inquisition to make (section 5 of the act, *vide* p. 176, *ante*).

Sheriff's or constable's return to precept.

Before Hon.

Justice of the

court.

THE PEOPLE *ex rel.* JOHN DOE,
Complainant,

T.

RICHARD ROE,

Defendant.

Pursuant to the precept issued to me herein I do hereby return, that I have caused to appear at the time and place mentioned in said precept, twenty-four inhabitants of the said county, duly qualified to serve as jurors, to wit, the following named persons. (Here insert names and residences.) *

To inquire upon their oaths of the forcible entry or detainer made and continued by Richard Roe as it is said upon the lands and premises of John Doe in said precept referred to.

New York, , 187 .

Form of oath to jury.

You, and each of you, do swear that you will well and truly inquire into the forcible entry (or forcible holding out) complained of by John Doe against Richard Roe and a true inquisition thereof to make, so help you God.

The jury so sworn must not exceed twenty-three in number (2 *Cai.* 98) ; they are to make inquiry into the forcible entry or the forcible holding complained of, and may examine the witnesses produced, and are to make and sign their inquisition before the justice, and are to deliver the same to him (section 5 of the act, *vide* p. 176, *ante*).

The form of this inquisition is given below. The jury of inquiry are not to examine questions of title, or of the right of possession on the part of either contestant, and are confined to the simple inquiry as to

whether there has been a forcible entry or detainer within the meaning of the Statute (*Carter v. Newbold*, 7 *How.* 166; *The People v. Wilson*, 13 *Id.* 446).

Oath to witnesses.

You do swear that the evidence you shall give touching the forcible entry (or forcible holding out) complained of by John Doe against Richard Roe, and now to be here inquired into, shall be the truth, the whole truth, and nothing but the truth: so help you God!

Inquisition.

An inquisition taken before _____ one of the judges of the Court of Common Pleas, in and for the city and county of New York, at the Court House in the city and county of New York, on the day of _____ 187, by the oaths of (here insert the names of the jurors who concur in the inquisition).

The undersigned inhabitants of the city and county of New York aforesaid, qualified to serve as jurors, having been summoned to inquire of the forcible entry (or forcible holding) hereinafter mentioned, and having appeared at the time and place aforesaid, before the said county judge, who then and there administered to the undersigned an oath well and truly to inquire into the forcible entry (or forcible holding out) complained of by John Doe against Richard Roe, and a true inquisition thereof to make. Whereupon the undersigned jury so sworn, having then and there proceeded to make inquiry into the said forcible entry (or said forcible holding out) complained of, and examined the witnesses on oath administered by the said judge, before him then and there made, now here make this their inquisition as follows, to wit:

The undersigned jury have found and hereby find and present, that John Doe of said city and county aforesaid, long since had an estate of freehold (or other estate, describing the same) in that certain piece or parcel of land in the city of New York aforesaid, and which is bounded and described as follows: (Here insert description of premises as contained in complaint), and that the said John Doe, was long since peaceably and lawfully possessed of the same, and that the estate and possession of the said John Doe, so subsisted and continued until Richard Roe, of said city and county, on the _____ day of _____ 187, * did forcibly and unlawfully, and with strong hand, enter into the said land and premises and eject and expel him, the said John Doe therefrom; and the said John Doe so expelled from the said land and premises, from the said _____ day of _____ 187 until the day of the taking of this inquisition, unlawfully and forcibly, and with strong hand did keep out and does yet keep out, to the great disturbance of the people of the state of New York, and contrary to the form of the statute in such case made, and that the estate of the said John Doe as aforesaid, still subsists therein.

And the said jurors, whose names are subscribed hereto, do, on the evidence produced before us, find the inquisition aforesaid true.

(Signatures of Jurors.)

* If the inquisition find the entry in a peaceable manner, and that the possession was held by force, then proceed from the asterisk (*) as

Restitution ordered, if there is no traverse.

If the jury find that the defendant is guilty of the forcible entry or detainer, and the defendant does not traverse the inquisition in the manner specified in the statute, and within twenty-four hours after it is found, the officer shall award restitution of the premises, and assess the costs and expenses of the proceedings, and issue his precept to cause restitution, and for the collection of the costs in the same manner as on judgment of verdict of guilty on the trial of such traverse.

The costs and expenses here allowed, are only the fees of the officers who are required to perform services in these proceedings.

Award of restitution after inquisition.

Before Hon.

Justice.

<p>THE PEOPLE <i>ex rel.</i> JOHN DOE, <i>v.</i> RICHARD ROE.</p>

The jury summoned and sworn to inquire into the forcible entry (or forcible detainer), complained of by John Doe, against Richard Roe, having made their inquisition, by which the said Richard Roe, is found guilty of the said forcible entry (or forcible detainer), and the defendant not having traversed the said inquisition within the time allowed by law; I, the undersigned county judge of the county of _____ before whom the said proceeding is pending, do hereby award restitution to the said John Doe, of the premises described in the said inquisition, and do also hereby assess the costs and expenses of the said proceedings at the sum _____ dollars.

Justice.

follows:—made entry in a peaceable manner into the said lands and premises, and after such entry did then and there violently, forcibly, and unlawfully and with strong hand, hold the said John Doe out of possession of his said lands and premises; and the said John Doe from the said _____ day of _____ until the day of the taking of this inquisition, unlawfully and forcibly did keep out, and does yet keep out of the lands and premises aforesaid, to the great disturbance of the people of the state of New York, and contrary to the form of the statute in such case made; and that the estate of the said John Doe as aforesaid, still lawfully subsists therein.

And the said jurors, whose names are subscribed hereto, do, on the evidence produced before us, find the inquisition aforesaid true.

(Signatures of Jurors.)

“Precept” or “Writ of Restitution.”

The People of the state of New York, to the sheriff or any constable of the city and county of New York, Greeting :

Whereas, John Doe of said city and county, did, on the day of 187 , make complaint in writing, duly verified, to the undersigned county judge of said county, that Richard Roe of said city and county on the day of at aforesaid, did, &c. (Here recite the complaint and the subsequent proceedings, and then add)

This is therefore to command you to go to the premises aforesaid, and to cause the said John Doe, to be restored and put into full possession of the said lands and premises according as he was seized or possessed thereof before the said entry.

And you are also further commanded to levy and collect the sum of dollars of the goods and chattels of the said Richard Roe, (excepting such goods and chattels as are by law exempt from levy and sale on execution), and to bring the money before me within sixty days from the date hereof to render to the said John Doe.

Given under my hand, the day of 187 .

Justice.

Traverse for inquisition, &c.

If by such inquisition it shall be found that forcible entry was made, or that the entry being peaceable, the possession was forcibly kept, the party complained against may traverse such inquisition, in writing, denying such forcible entry, or forcible holding out; or by alleging that he or his ancestors, or those whose estates he has in such lands, have been in quiet possession thereof for the space of three whole years next before such inquisition found, and that his interest therein has not ended or determined, as follows :

Form of traverse of inquisition.

Before Hon.

Justice.

THE PEOPLE *ex rel.* JOHN DOE,

v.

RICHARD ROE.

And afterward, to wit: on the day of 187 , at the city and county of New York aforesaid, before the said county judge as aforesaid, comes the said Richard Roe, in his proper person, and having heard the said inquisition read to him hereby traversing the same (*) denies that he is guilty of the said supposed forcible entry (or forcible holding out) in manner and form as in the said inquisition alleged, and of this, he, the said Richard Roe, puts himself upon the country, and the said people do the like, &c., (or from the asterisk (*) proceed thus): alleges that he, the said Richard Roe, or his ancestors, or those whose estate he has in the lands in said inquisition described, have been in quiet possession thereof for the space of three

whole years next before the said inquisition found, and that his, the said Richard Roe's interest therein, is not ended or determined, and of this, he, the said Richard Roe, puts himself upon the country, and the said people doth the like, &c.

RICHARD ROE.

And if the defendant shall pay to such officer the fees of summoning a jury to try such traverse, and the jurors' and officers' fees on such trial, such traverse shall stay all further proceedings on such complaint and inquisition, until the same be tried (section 6 of the act, *vide* p. 176, *ante*).

If any person shall make affidavit before such officer, that the party complained against is the tenant of such person under a valid and then subsisting demise, he shall be permitted on payment of the fees specified in the last section to traverse the inquisition as landlord, in the said manner as is allowed to the party complained of, either with such party or without him (*Id.* section 7, *ante*, p. 176).

The proceedings in the traverse seem at first blush to be an anomaly in civil proceedings, from the fact that two juries instead of one are called upon to adjudicate upon the rights of the respective parties; but when we consider that the proceeding was originally of a criminal nature (*Wood v. Phillips*, 43 *N. Y.* 152), it will not be surprising to find the apparent close analogy between these and ordinary criminal proceedings. In these last mentioned proceedings, the grand jury form the jury of inquiry; if they find no cause therefor, they decline to indict, and that generally terminates the proceeding; if they do indict, however, the defendant is put upon trial before a petit jury, and before this jury his rights are more thoroughly considered and finally disposed of. It is not to be understood that the proceedings are alike in all respects, but that the one bears a very strong resemblance to the other. If it shall be found by the inquisition made by the jury of inquiry, that the defendant is guilty of a forcible entry or detainer, and the defendant traverses the inquisition and

pays the necessary fees for summoning a jury to try the traverse, the officer entertaining the proceeding shall issue a precept to the sheriff, or any constable of the county, commanding him to summon twelve qualified jurors to come before such officer at the place therein to be specified, at a time not less than four, nor more than eight, days thereafter, to try such traverse (section 8 of the statute, *vide* p. 177, *ante*); and although the traverse has been made, it is not too late for a motion to be made to quash the inquisition (*The People v. Wilson*, 13 *How.* 446); and the court may permit the defendant to move to set aside the inquisition, on the ground of the rejection of proper evidence before the jury which found it (*Carter v. Newbold*, 7 *How.* 166).

If any of the persons summoned as jurors are found to be disqualified, the sheriff or constable may be directed to summon others in their places until his panel contains twelve qualified jurors; the traverse can not be tried with less (*Porter v. The People*, 7 *How.* 441).

Precept for jury to try traverse.

The people of the state of New York to the sheriff or any constable of the city and county of New York, Greeting:

You are hereby commanded to summon twelve good and lawful men of the city and county of New York, duly qualified to serve as jurors, and not exempt from serving on juries in courts of record, and in no wise akin to John Doe or Richard Roe, of the same place, to come before the undersigned county judge of said county at the Court House, City Hall, in the city of New York, on the day of inst., to make a jury of the county, upon their oaths to try a certain traverse of an inquisition, found upon the complaint of the said John Doe against the said Richard Roe, and now pending before me for a certain forcible entry (or forcible holding out of possession), made by the said Richard Roe, into the lands and premises of said John Doe, in the city of New York aforesaid, against the form of the statute in such case made and provided. And that you make a list of the persons summoned, and certify and annex the same to this precept, and make return hereof to me.

Given under my hand, this day of , 187 .

Justice.

Oath of jurors.¹

You and each of you do swear that you will well and truly hear, try, and determine the traverse of an inquisition found upon the complaint of John Doe against Richard Roe, for a certain forcible entry (or forcible detainer) made by the said Richard Roe into the lands and premises of the said John Doe, as is alleged, and a true verdict give according to the evidence, so help you God.

Oath to witnesses.

You do swear that the evidence you shall give touching the forcible entry (or forcible detainer) complained of by John Doe against Richard Roe, on the traverse of the inquisition found upon the said complaint, shall be the truth, the whole truth, and nothing but the truth, so help you God.

Proceedings before the jury ; what may be shown.

Section 9 of the statute (*ante*, p. 177) provides for the manner of summoning, returning and impanelling the jury. If any of the individuals summoned are found to be disqualified, the sheriff or constable may be directed to summon others in their places, until the panel contains twelve qualified jurors ; there can not be less (*Porter v. The People*, 7 *How.* 441). If the jury are unable to agree, they are to be discharged, and a precept issued for a new jury (§ 10, *ante*, p. 177).

Section 11 of the act (*ante*, p. 178) provides what the complainant and defendant may show upon the trial. The legislature has not cast upon either jury the burden of investigating titles to real property (*People v. Leonard*, 11 *Johns.* 504 ; *Carter v. Newbold*, 7 *How.* 166 ; 1 *Daly*, at p. 46). Their duty seems to be defined in this section (*ante*, p. 178, § 11).

Proof of a sufficient estate or right of possession is to be made to the judge before any process can be issued ; but on the trial of the traverse before the second jury, the complainant is only required to show, in addition to the forcible entry and detainer complained of, that he was peaceably in actual possession, or was in the constructive possession at the time of the act complained of (*vide* cases cited above). Nor is the defend-

ant authorized to show or avail himself of any estate or right of possession in a stranger (*Carter v. Newbold*, 7 *How.* 166). The proceedings are altogether statutory, and neither judge nor jury has any other power than what the act confers (*Id.*). The only matter inquirable into upon the trial is whether the party charged entered by force upon one, having previously a peaceable possession, and held out by force (*Wells v. De Leyer*, 1 *Daly*, at p. 46, citing 9 *Wend.* 51; 11 *Johns.* 504, and 8 *Cow.* 226).

If the jury find the defendant guilty, the magistrate shall thereupon award restitution of the premises so forcibly entered, or forcibly held and detained, and shall assess the costs and expenses of the proceedings (section 12 of the statute, *ante*, p. 178; *People v. Townsend*, 6 *How.* 178); which do not include the fees of attorneys, but refer to the fees of the officers who are required to perform the services. The statute regulating the fees of attorneys applies only to suits in courts of record, and the proceedings in forcible entries and detainers, are not an action in a court of record within the meaning of that statute (*The People v. Townsend*, 6 *How.* 178; *Van Hovenburgh v. Case*, 4 *Hill*, 541; *Partridge v. Ford*, 5 *How.* 21).

Award of restitution after verdict.

(*Title as in complaint.*)

The jury summoned and sworn to hear, try, and determine the forcible entry (or forcible detainer) complained of by John Doe against Richard Roe, having rendered their verdict, by which the said Richard Roe is found guilty of the said forcible entry (or forcible detainer), I, the undersigned, judge of the court of Common Pleas, in and for the city and county of New York before whom the said proceeding is pending, do hereby award restitution to the said John Doe of the premises described in the complaint of the said John Doe, and do also hereby assess the costs and expenses of the said proceedings at the sum of dollars.

Dated, &c.

Justice.

Writ of restitution after verdict.

(Same as *ante*, page 206, reciting the complaint and all subsequent proceedings.)

CHAPTER XXIII.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS
TO RECOVER THE POSSESSION OF DEMISED
LANDS AND PREMISES.**The object, design, and application of the Statute.**

Previous to the act of April 13, 1820 (chap. 194), the only remedy the law furnished to landlords for the recovery of lands and tenements, upon the forfeiture or expiration of the tenant's term was the action of ejectment: a proceeding so expensive and dilatory as against a tenant litigiously inclined and perhaps irresponsible, as to amount in some cases almost to a denial of justice. The statute was designed to remedy this evil, by providing the landlord with a simple, speedy, and inexpensive summary method of regaining possession of his premises, in cases where the tenant refuses upon demand to pay the rent, or where he wrongfully holds over, and continues in possession of the demised premises, after the expiration of his term, without permission. The statute is restricted in its application, however, to cases where the conventional relation of landlord and tenant, created by agreement, exists between the parties, and does not embrace every case where ownership is in one, and possession in another, but only where he who is in possession, has by some act or agreement recognized the other as his landlord, and assumed the character of a tenant under him, so that he is not at liberty to dispute his title (*Benjamin v. Benjamin*, 5 *N. Y.* 383; *Mitchell v. Simpson*, 28 *N. Y.* 55; *Roach v. Cosine*, 9 *Wend.* 227; *Sims v. Humphrey*, 4 *Den.* 185; *People v. Bigelow*, 11 *How. Pr.* 83; *Wright v. Mosher*, 16 *How.* 454; *Russell v. Russell*, 32 *Id.* 400; *People v. Annis*, 45 *Barb.* 304; *Denel v. Rust*, 24 *Id.* 438).

The remedy has by degrees been extended by statute to lessees of the corporation of Brooklyn (1850, p. 285, § 40) ; against keepers of poor houses (1862, ch. 298) ; against keepers of bawdy houses (1868, ch. 764) ; against illegal trades (1873, ch. 583, § 1) ; against overholding tenants working farms on shares (1874, ch. 471, p. 612) ; against any person whose real estate has been sold, and title perfected, under mortgage foreclosure (1874, ch. 208) ; or under executions against property (§ 28. subd. 4, *ante*, p. 185).

These general principles in their application to particular cases are illustrated by the following citations :

1. The relation of landlord and tenant, in the strict technical sense of the term, exists between the lessee, or his assignee, and the assignee or grantee of the lessor, provided there was a conventional relation between the original parties (*Birdsall v. Philips*, 17 *Wend.* 464 ; *Miller v. Levi*, 44 *N. Y.* 489 ; 1 *Edm. R. S.* p. 698, § 23).

2. Where a party enters into the possession of premises, under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes, by such refusal, a tenant at will, or by sufferance, and may be proceeded against summarily, under the statute (*Anderson v. Prindle*, 23 *Wend.* 616 ; and see 14 *Abb.* 372 ; 38 *Barb.* 269.)

3. Where the owner agrees that his creditor may occupy premises belonging to him, for the term of one year, and until he pays a mortgage which the creditor holds against him, the relation of landlord and tenant is thus created between the parties ; and on payment of the money, after the first year, and refusal of the creditor to yield up the possession, the owner may properly resort to summary proceedings against the creditor, to obtain possession (*Hunt v. Comstock*, 15 *Wend.* 665).

4. A judgment debtor, continuing in possession of real estate after title thereto has been perfected under a sale on the execution against him, is a tenant within

the meaning of the statute (*Spraker v. Cook*, 16 *N. Y.* 567).

5. A wharf or pier, reclaimed from tide-water by embankment, or by raising the bottom with stone, earth, or other material, is within the act (*People v. Kelsey*, 14 *Abb. Pr.* 372; *S. C.* 38 *Barb.* 269); but in a subsequent case, where the relators who were entitled to use a pier for loading and unloading canal-boats, agreed to pay the respondent, the lessee of the pier, fifty dollars a month for the privilege of placing a derrick, scales, and office upon a certain portion thereof, it was *held*, that this did not create the relation of landlord and tenant, and that, upon the termination of the agreement, they could not be dispossessed under the landlord and tenant act (*The People v. Cushman* 8 *Supreme Court* [1 *Hun.*] p. 73). In the first of said cases the demise was of the wharf itself, which, for the purpose of the proceeding, was held to be land; in the second case the subject of the so-called demise was not the reality itself, but a mere naked privilege of using, on the pier, utensils and machinery, and the court held that the contract granting such privilege, did not create the relation of landlord and tenant. The distinction between the two cases is obvious. This summary remedy does not extend, however, to cases (1) where the relation of landlord and tenant is created merely by operation of law (*Williams v. Bigelow*, 11 *How.* 83; *Burnett v. Scribner*, 16 *Barb.* 621; *Keneda v. Gardner*, 3 *Id.* 589; *Doolittle v. Eddy*, 7 *Id.* 74; *Livingston v. Tanner*, 14 *N. Y.* 64; *Carlisle v. McCall*, 1 *Hill.* 399; *People v. Simpson*, 14 *Abb.* 457, and notes, 28 *N. Y.* 55); (2) nor to agreement for the purchase of real estate, where the vendee is in possession (*Oakley v. Schoonmaker*, 15 *Wend.* 226; *Caswell v. Districh*, *Id.* 379; *Putnam v. Wise*, 1 *Hill.* 234), the proper remedy being by ejectment (3 *Barb.* 576; 7 *Cow.* 747); (3) nor to agreements for board and rooms (*Wilson v. Martin*, 1 *Den.* 602); (4) nor to disputes between grantor and grantee, for conditions not performed (*Roach v. Cosine*,

9 *Wend.* 227); (5) nor to intruders entering into possession immediately after the expiration of the tenant's term, but without the tenant's assent or landlord's permission (*Carlisle v. McCall*, 1 *Hill.* 399; *Sliker v. Hovey*, 4 *Lans.* 86); (6) nor to a case where the owner of the fee subject to a life estate made a lease to a third person (*Buck v. Binninger*), 3 *Barb.* 391; (7) nor as between the widow of a person who died in possession of premises, claiming to own them, on the allegation that the applicant stated to the widow that she might continue to occupy the premises until a day named, without payment of rent, the widow not assenting otherwise than by continuing in possession (*Benjamin v. Benjamin*, 1 *Seld.* 383); (8) nor to agreements between master and servant, by which the servants are furnished with a habitation without rent (*Haywood v. Miller*, 3 *Hill*, 90; *People v. Annis*, 45 *Barb.* 304; *Taylor v. Bradley*, 4 *Abb. Ct. App. Decis.* 363; and see 53, *Barb.* 258); (9) nor to cases where the tenant for life of another holds possession after the determination of his estate (*Livingston v. Tanner*, 14 *N. Y.* 64; and see *Id.* 430); (10) nor to cases where the tenant fails to pay the taxes which he covenanted to pay as one of the conditions of his lease, in addition to the rent reserved (*The People v. Swayze*, 15 *Abb.* 432); but it is claimed that where the agreement provides that the amount of the unpaid tax may be added to and form part of the rent, that the above decision does not apply; (11) nor as between mortgager and mortgagee (*Evertson v. Sutton*, 5 *Wend.* 281); (12) nor as between the tenant in possession and one to whom he assigns his lease (*The People v. Simpson*, 28 *N. Y.* 55).

Proceedings may be taken by the grantees and representatives of the parties.

These proceedings may be commenced by the landlord or lessor, or his legal representatives, agents, or assigns (see § 29 of statute, *ante*, p. 186); and see pro-

visions as to grantees and assignees (*vide ante*, pp. 76, 86); and as to executors and administrators (*Id.* p. 75); and the term "legal representatives," as employed in the statute, is supposed to refer to those who, after death, succeed to the legal rights and remedies of the landlord, and stand in his place, representing him in respect thereto, as heirs, executors, or administrators, in the cases in which, by operation of law, will, or otherwise, the estate of the landlord is of such a nature as to go to or become vested in the persons occupying these respective relations or positions, in which cases they are authorized to assert their right thereto in the same manner as the intestate or testator might have done if living, and the term "assignee" includes "grantee."

The proceedings under the statute may be taken against the tenant and every one holding or claiming under him (§ 28, *ante*, p. 184; § 30, p. 186); and infancy is no defense to summary proceedings (3 *Hill*, 147); and as to who are under-tenants and who are assignees (see *ante*, pp. 84, 85, 88).

The various statutory provisions upon summary proceedings will be found in the laws of 1820, chap. 194, p. 176; laws of 1842, chap. 240, p. 293; laws of 1849, chap. 193, p. 291; laws of 1850, chap. 144, p. 285, § 40; laws of 1851, chap. 460, p. 852; laws of 1857 (vol. 2), chap. 684, p. 509; laws of 1862, chap. 298, p. 499; laws of 1862, chap. 368, p. 621; laws of 1863, chap. 189, p. 328; laws of 1866 (vol. 2), chap. 754, p. 1636; laws of 1868 (vol. 2), chap. 764, p. 1724; laws of 1868 (vol. 2), chap. 828, p. 1930; laws of 1870 (vol. 2), chap. 741, p. 1832; laws of 1874, chap. 208, p. 229; laws of 1874, chap. 471, p. 612. And see the statute as it now stands (*ante*, pp. 174, 182).

Arrangement of the ten chapters upon the law and practice of summary proceedings.

Chap. 23	relates to	"The object, design, and application of the statute."
" 24	"	"The rules of construction."
" 25	"	"The officers having jurisdiction."
" 26	"	"Proceedings for non-payment of rent."
" 27	"	"Proceedings for holding over."
" 28	"	"Affidavits and its requisites."
" 29	"	"Summons and its service."
" 30	"	"Practice upon return-day."
" 31	"	"Proceedings upon the trial."
" 31	"	"Final determination and its effect."

CHAPTER XXIV.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS
—*Continued.***Rules of Construction applicable to the Statutes. Jurisdiction and proceedings thereafter.**

The rule of construction applicable to special or limited jurisdictions created by statute, is, that being the creature of the statute, the officer must clothe his proceedings with all the solemnities prescribed by the act which gives the power, and that such jurisdictions are (like justices' courts not proceeding according to the course of the common law) confined strictly to the jurisdiction given to them, and take nothing by implication (*Jones v. Reed*, 1 *Johns. Cases*, 20; *Wells v. Newkirk*, *Id.* 228; *Way v. Carey*, 1 *Cai.* 191; *Wylie v. Hyde*, 13 *Johns.* 249; *Toof v. Bentley* 5 *Wend.* 276; *Watson v. Davis*, 19 *Id.* 371; *Yager v. Hannah*, 6 *Hill*, 631; *Payne v. Hathway*, 4 *N. Y. Leg. Obs.* 21; *Bigelow v. Stearns*, 19 *Johns.* 39; *Loomis v. Bowers*, 22 *How.* 361; *Graham on Jurisdiction*, p. 4). The rule is, to be strict in holding them to the jurisdiction conferred, but in all matters in which they have jurisdiction, to be liberal in reviewing their proceedings as respects form, regularity, and such like (*Jones v. Reed*, 1 *Johns. Cases*, 20; *Baker v. Dumbolton*, 10 *Johns.* 240; *Day v. Wilbur*, 2 *Cai.* 134; *Baum v. Tarpenny*, 3 *Hill*, 75; *Stafford v. Williams*, 4 *Denio*, 182; *Bellows v. Sackett*, 15 *Barb.* 96; *Peters v. Diossy*, 3 *E. D. Smith*, 115); and in determining the powers of such courts, the substance and not the form, the thing itself and not the name by which it may be called, is regarded (*Elwell v. McQueen*, 10 *Wend.* 520; *McAdam's Marine Court Pr.*, 1st ed. p. 108).

These general principles have been applied to summary proceedings, and the courts have held that being in derogation of the common law, the statute must be strictly pursued in all the things upon which jurisdiction depends (*Farrington v. Morgan*, 20 *Wend.* 207 ; *Hill v. Stocking*, 6 *Hill*, 314). Thus in *Farrington v. Morgan* (*supra*) it was held that where the statute directed the magistrate to nominate eighteen respectable persons, who were to be summoned as jurors, twelve of whom were to be ballotted for as the jury of trial, and the magistrate ordered twenty jurors, this was held to be erroneous under the tenant's objection, and the adjudication was for this reason reversed. The magistrate at that time had no power, however, to try such a proceeding without a jury (*Benjamin v. Benjamin*, 5 *N. Y.* 383). The power has since been conferred by amendment of § 34 of the act (1857, chap. 684).

In *Benjamin v. Benjamin*, 5 *N. Y.* 385, the court said : "This statutory remedy, by way of a summary proceeding, is in derogation of the common law by action, and must be strictly construed. A peculiar and limited jurisdiction is thereby conferred upon certain magistrates, which can be exercised only in the way prescribed."

The statute, however, being a remedial one, is to be construed liberally, to carry into effect its intent, by suppressing the mischief, and advancing the remedy, in all cases where there is jurisdiction in the magistrate (*Lynde v. Noble*, 20 *Johns.* 80 ; 17 *Wend.* 464 ; *Farrington v. Morgan*, 20 *Id.* 207 ; *Smith v. Moffat*, 1 *Barb.* 65).

The dictum of BRONSON, J., in *Hill v. Stocking* (6 *Hill*, 317), that these proceedings are to be carefully watched, lest they be turned into the means of working injustice and oppression, is to be remembered by the practitioner in preparing the affidavit, and in conducting the proceedings under the statute so that they may

bear the scrutiny and watching suggested by Judge BRONSON, if that ordeal should become necessary.

The remark, however, was evidently intended only for those cases in which, owing to peculiar circumstances, the summary nature of the remedy worked injustice and oppression, and not to the ordinary class of cases, in which this remedy has since become a necessity, and the proceeding being remedial in its character is to be liberally construed, in cases where jurisdiction has properly attached, so as to uphold the proceeding if possible. *Hill v. Stocking (supra)* was of the class of cases where the justice never acquired jurisdiction, and the strict rule of construction, before referred to (p. 216, *ante*), was applied. If it had belonged to the opposite class of cases, where jurisdiction had fully attached, the liberal rule, as to remedial statutes, would most likely have been adopted.

CHAPTER XXV.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS—
Continued.

Judicial officers having jurisdiction.

The statute provides that the following judicial officers shall have jurisdiction of summary proceedings, viz. : “any judge of the county courts of the county, or any justice of the peace of the city or town where the premises are situated, or any mayor or recorder of the city where such premises are situated, or in the city of New York, by the Mayor, Recorder, any Justice of the Marine Court, or any one of the Justices of the District Courts of the city of New York (see § 28, *R. S. ante*, p. 184), or by the City Judge of said city (*Marry v. James*, 2 *Daly*, 437), or by the City Judges of the city of Brooklyn, where the premises are situated in Kings county (1849, p. 174, § 26 ; 1870, chap. 470, § 13), or by any Justice of the Superior Court of the city of Buffalo where the premises are situated within that city (1857, vol. 1, p. 754, § 25), and the jurisdiction conferred by this statute is in a territorial point of view co-extensive with that of the officer upon whom it is conferred (*Roach v. Cosine*, 9 *Wend.* 227 ; *Carlisle v. McCall*, 1 *Hill.* 399). In the cases just cited, it was held that the jurisdiction of a Justice of the District Court in the city of New York, extended over the whole city, and was not limited to the district in which the parties resided or the premises were situated.

The officers hereinbefore named having jurisdiction of these proceedings, may be classified with reference to locality in manner following :

Where the premises are located within the city of New York.

The Mayor.

The Recorder.

The City Judge.

The Justices of the Marine Court.

The Justices of the District Courts.

Where the premises are situated within the city of Brooklyn.

The Recorder.

The Judges of the City Court of Brooklyn.

The County Judge of Kings County.

The Justices of the Peace.

Where the premises are situated within the city of Buffalo.

The Recorder.

The Justices of the Superior Court of the city of Buffalo.

The County Judge of Erie County.

The Justices of the Peace.

Where the premises are not located within the three cities named.

Any Judge of the County Court of the county in which the premises are located.

Any Justice of the Peace of the city or town in which the premises are located.

CHAPTER XXVI.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS—
Continued.

- I. Definition of rent.
- II. Auxiliary remedies.
- III. Demand for rent—When and how made.
- IV. Demand upon joint tenants.
- V. Landlord's breach of covenant.
- VI. Payment of rent after commencement of proceedings.

I.

Definition of rent.

Rent is a periodical return made by any particular tenant of land, either in money or otherwise, in retribution for the land ; a rent must be certain, or capable of being made so by either party (1 *Hilliard on Real Property*, 227), it is a certain profit issuing yearly out of lands and tenements corporeal (*Co. Litt.* 141g ; 2 *Bl. Com.* 41), and is defined by Lord Chief Baron GILBERT to be an annual return made by the tenant, either in labor, money or provisions, in retribution for the land that passes (*Gilb. Rents*, 9 ; note to *Co. Litt. by Thomas*, vol. 1, p. 508) ; but the general understanding of the term rent, is the payment of a specified amount of money on a day named in the lease, for the use and occupation of the demised premises, and it is very doubtful, to say the least, whether a summary proceeding can be maintained in any case, where the agreement provides for the payment of rent in anything but money (*Oakley v. Schoonmaker*, 15 *Wend.* 226) ; and the only practical method suggested for obviating the difficul-

ties arising in a case where the rent is payable in labor or provisions, is to bring an ordinary civil action upon the contract, and by the judgment fix the amount of the rent in dollars and cents, and then perhaps a proceeding might be maintained to compel the payment of the amount so determined upon as in the case of any other fixed rent, for while the judgment would be conclusive as to the amount, it would not merge the summary remedy, if applicable to such a case (see authorities collated at p. 79, and for rent payable in kind, see *Taylor's L. & T.* §§ 391, 392), and a demand for the rent as fixed, would of course be necessary, as in other cases.

II.

Auxiliary remedies.

It is supposed that an ordinary civil action for the recovery of the rent, and a summary proceeding for the possession of the premises, may proceed at the same time, although there can be but one satisfaction (see *Gridley v. Rowland*, 1 *E. D. S.* 670, and see *ante*, p. 79).

Landlord entitled to interest upon rent after default.

Proceedings to dispossess a tenant for non-payment of rent are not invalidated because of demand of the rent with interest, because the landlord is entitled to interest, as an incident to the principal, from the time of the default in payment (*The People v. Dudley*, 58 *N. Y.* 323).

Effect of foreclosure by lessor of mortgage upon lease. Joinder of parties as landlords in summary proceedings.

S., being the lessor of certain premises, and also mortgagee of the lease and term, took possession under a warrant of dispossession against the lessees.

He then foreclosed his mortgage ; this, by its terms, was made subject to rents, covenants, &c., of the lease. The complaint in the foreclosure suit prayed, and the judgment directed, the sale of the premises and leases mortgaged ; neither contained the clause of the mortgage, that the term conveyed was subject to the payment of rent. The judgment directed the sheriff to deduct from the proceeds of sale all rents due upon the mortgaged lease. The relators were parties to the foreclosure suit, and became purchasers upon the sale, and it was held, that the sale was simply of the lease, with its correlative obligations ; that by the purchase, relators became assignees of the lease and term, and took subject to the obligation to pay rent, which had not been released or extinguished. It also appeared that the lease given by S. included premises owned by him, and also further premises in which he had a leasehold interest—that he died leaving a will, by which he devised and bequeathed all his real estate, and the residue of all his estate to his son N., and it was held, that there was sufficient unity of a right of possession in N., and the executors of S., as joint owners of the lease and representatives of the lessor, to justify proceedings instituted in their names, jointly, to dispossess the relators for non-payment of rent (*The People ex rel. Grissler v. Dudley*, 58 *N. Y.* 323).

III.

Demand for rent—when and how made.

Rent is demandable on the same day it becomes due, but the tenant has all day to pay it, and is not in default until after midnight of the day it is made payable (*Academy of Music v. Hackett*, 2 *Hill*. 217 ; *Oothout v. Ballard*, 41 *Barb.* 33 ; *Smith v. Aylesworth*, 40 *Id.* 104).

Before instituting summary proceedings under the

statute, demand must be made for the rent either personally of the tenant, or by the service of a three days' notice in writing, requiring the payment of the rent or the possession of the premises (§ 28, subd. 2, *ante*, p. 184), and this notice may be served in the manner prescribed for the service of the summons (*Id.* §§ 28, 32, *ante*, pp. 184, 187).

The notice may be in the following form :

Demand for rent by the service of a three days' notice.

New York, October 1, 1875.

To Richard Roe, tenant.

You will please take notice, that you are indebted to me in the sum of fifty dollars, for one month's rent of the house and premises, No. 1 Broadway, in the city of New York, in advance, from September 1, 1875, till October 1, 1875, and that I require the payment of said rent, on or before the fourth day of October, 1875 (three days' notice), or the possession of said premises.

Yours, &c.,

JOHN DOE, Landlord.

The act is in the alternative. The rent must be demanded, or a three day's notice in writing given, requiring payment—it is not necessary to do both (*Rogers v. Lynds*, 14 *Wend.* 173). In the case last cited, it was held that a demand of the rent might be made of the tenant in possession, but the Supreme Court, in *The People ex rel. Simpson v. Platt* (43 *Barb.* 116), held that a demand on the under-tenant in possession was insufficient, and that the demand must be made of the tenant, or the three days' notice given according to the statute ; and in *The People v. Gross* (50 *Barb.* 231), it was held that a demand of the rent under the statute must be made personally of the tenant, and that if the landlord relies for his demand upon a written notice under the second clause of the act, he must show a notice in the alternative, requiring payment or possession ; and in *Wolcott v. Schenk* (16 *How. Pr.* 449), it was held that a demand made at the lessee's usual place of business, not on the premises, and of his agent, with-

out saying who the agent was, or what was the nature of his agency, was insufficient.

Demand of rent at common law.

At common law, the rules by which estates are forfeited or divested are very strict, and a landlord attempting to enforce a condition of re-entry on account of the tenant's default in the non-payment of rent, must show compliance with the following things which must be previously done to entitle him to re-enter :

1. A demand must be made of the rent.
2. The demand must be of the precise rent due, for if a penny more or less be demanded, it will be ill.
3. It must be made precisely upon the day on which the rent is due and payable by the lease, to save the forfeiture, as when the proviso is, that if the rent shall be behind and unpaid for the space of thirty or other number of days, after the days of payment, it shall be lawful for the lessor to re-enter. A demand in such a case must be made on the thirtieth or other last day.
4. It must be made at a convenient time before sunset.
5. It must be made upon the land, and at the most notorious part of it, unless a place be appointed where the rent is payable, in which case the demand must be made at such place.
6. A demand must be made in fact, and so averred in pleading, although there should be no person on the land ready to pay it. At common law, rent reserved, payable yearly, is to be paid on the land, because the land is the debtor, and that is the place of demand appointed by law. So if a man leases rendering rent, and the lessee binds himself in a sum to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligor (*Co. Litt.* 201*b*), and this is upon the principle that rent is a profit issuing out of lands and tenements corporeal.

Statutory demand for rent.

The question has been raised as to when and at what place, and in what words a personal demand for the rent should be made in order to satisfy the requirements of the statute.

The statute is silent on the subject, and only requires that a demand of the rent shall have been made, and it would seem to be a fair and reasonable construction, to hold, that any words of demand, by the landlord, intelligible to the tenant, made after default, ought to be sufficient to satisfy the requirements of a remedial statute, endeavoring to shake off the intricacies and niceties by which the common law endeavored to prevent forfeitures and actions to enforce them. The common law did not favor the forfeiture of estates, and was therefore technical in exacting great precision both as to the form, place and time of the demand required from those seeking to enforce them. The statute, however, furnishes every safeguard against forfeiture of the tenant's estate, by allowing him to pay rent at any time before the warrant issues to remove him (§ 44, *ante*, p. 192), and by staying the issuing of the warrant of removal for ten days by giving a bond to pay the rent and costs within that time (*Id.*), and finally by allowing him one year after the execution of the warrant to redeem in cases wherein the tenant's unexpired term at the time of issuing the warrant, exceeds five years (§ 54, *ante*, p. 196), and there is no case holding that the technical rule in regard to forfeitures, laid down in 16 *Johns.* 222; 17 *Id.* 66; 18 *Id.* 447; 2 *Hill.* 217, applies to these proceedings, excepting one of Justice BROWN in *Wolcott v. Schenck* (16 *How.* 450), in which he says: "The right to re-enter for the non-payment of rent, both at the common law and in pursuance of the statute, is a matter *stricti juris*, and whoever asserts it, must see that every pre-requisite to its exercise, is exactly performed. It is a right which the law will enforce but

will not favor. The statute requires that a "demand of such rent shall have been made," and it uses this expression in the sense in which it was used at the common law." A literal performance of the common law pre-requisites to a demand for rent seems contrary to the genius, spirit and purpose of the statute, and is in some respects contrary to the adjudications. A few illustrations will suffice. In the first place, at common law, a demand might lawfully be made upon the land, which was in theory considered the debtor, but the authorities hold that such a demand is insufficient under the statute, that it must be personal upon the tenant or by the service of the three days' notice provided by statute (see *The People ex rel. Simpson v. Platt*, 43 *Barb.* 116; *The People v. Gross*, 50 *Id.* 231). In the next place, a common-law demand, to be effective, was required to be made upon the very day on which the rent is due and payable, and at a convenient hour before sunset. This pre-requisite if literally enforced would seriously embarrass if not defeat what was designed to be a simple as well as speedy remedy. Landlords, particularly of tenements, would be inconvenienced, and their tenants considerably annoyed by demands for rent before sunset on the first day of the term, yet if the demand should be postponed to the second day of the term, the remedy would be forever gone. Therefore, we repeat, that it would be a fair and reasonable construction of this statute, to hold, that any words of demand by the landlord, intelligible to the tenant, made after default, satisfies the requirements of this remedial statute, which was intended to supersede the formula, circumlocution and verbosity peculiar to the common-law remedy of ejectment, by introducing a new proceeding more terse, simple and summary, freed from the evils of the former remedy which by its intricacy and delay became of little practical utility to landlords; of course the landlord must not be excessive in his demand, he must not insist upon more

than is actually due, for if he does, the tenant is not placed in default by refusing or neglecting to comply with it, but the proceedings will not be invalidated because of the demand of the rent with interest; because the landlord is entitled to interest, as an incident to the principal, from the time of the default in payment (*The People ex rel. Gottlieb Grissler v. Dudley*, 58 *N. Y.* 323).

IV.

Demand upon joint tenants.

Where two tenants hold jointly a demand on either is sufficient (*Geisler v. Weigand*, 9 *N. Y.* 227), and one of two joint landlords may demand the whole rent, and commence proceedings for its non-payment in the name of both (*Griffin v. Clark*, 33 *Barb.* 46; and see 3 *Bosw.* 63).

V.

Where the landlord's breach of covenant constitutes no defense.

It is not competent for the tenant in these proceedings to show a breach of the landlord's agreement to construct the premises in a proper manner. The tenant can not withhold both the rent and the possession (*The People v. Kelsey*, 14 *Abb. Pr.* 372; *S. C.* 38 *Barb.* 269; *La Farge v. Mansfield*, 31 *Id.* 345; 1 *Bosw.* 646; *S. C.* 16 *How. Pr.* 164).

VI.

Payment of rent after commencement of proceedings.

In Chapter VI. (*ante*, p. 47) the time and mode of payment of rent is fully stated, and in the same

chapter (*ante*, pp. 52. 53), the effect of a tender before and after suit brought is also considered.

The tenant may even after suit brought or summary proceedings commenced pay his rent, provided he pay the taxable costs therewith.

The rent and costs may be paid in summary proceedings, at any time before the warrant is actually issued.

Demanding receipt.

In *Griffith v. Hodges* (1 *Car. & P.* 419), ABBOTT, C. J., said : “ No man can insist on a receipt in full of all demands ; and if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, I have no doubt that such tender is bad ” (see also *ante*, p. 53).

CHAPTER XXVII.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS

—*Continued.*—PROCEEDINGS FOR HOLDING OVER.

- I. Consequences of holding over.
- II. The cases contemplated by the statute.
- III. Who to commence the proceedings.
- IV. Further liability of overholding tenants.
- V. Tenants at will and by sufferance.

I.

Consequences of holding over.

Upon the determination of the tenancy, the landlord is entitled to receive the full and complete possession of the demised premises from the tenant, who must, therefore, deliver up to his landlord the quiet and peaceable possession thereof, and if there be an under-tenant in possession, to whom the tenant has let the whole or part of the premises, the tenant must get him out, or the possession of the under-tenant will be regarded as the possession of the tenant, and the latter may be held liable for the consequences (*Harding v. Crethorn*, 1 *Esp.* 57; *Ibbs v. Richardson*, 9 *A. & E.* 849; *Bacon v. Brown*, 9 *Conn.* 334); and the landlord may remove the under-tenant, so holding over, by summary proceedings against the tenant, making the under-tenant a party, or the landlord may, at his option, treat the holding over by the under-tenant, as implying a new hiring by the tenant, upon the terms and conditions specified in the former lease (*Digby v. Atkinson*, 4 *Camp.* at p. 278; *Brewer v. Knapp*, 1 *Pick.* 332; *Ellis v. Paige*, *Id.* 43; *Frouty v. Wood*, 2 *Hill* (S. C.), 367; *Moore v. Beasley*, 3 *Ham.* 294;

Diller v. Roberts, 13 *S. & R.* 60; Bacon v. Brown, 9 *Conn.* 334; Darril v. Stevens, 4 *McCord.* 59; Witt v. The Mayor, 5 *Robt.* 248; Hunt v. Wolfe, 2 *Daly*, 298; Conway v. Starkweather, 1 *Den.* 113); and the Court of Appeals in Schuyler v. Smith (51 *N. Y.* 309), hold that where a tenant, for one or more years, holds over after the expiration of his term, the landlord has the option to treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable, and the right of the landlord to elect to continue the tenancy is not affected by the fact that the tenant refused to renew the lease, and has given notice that he has hired other premises, and that it is not in the power of the tenant alone to throw off the character thus imposed upon him.

II.

The cases contemplated by the statute.

The statute in regard to holding over, only contemplates cases in which the term has expired by lapse of time, and not by forfeiture for breach of conditions (Oakley v. Schoonmaker, 15 *Wend.* 226; Beach v. Nixon, 9 *N. Y.* 35); and it was accordingly held in Beach v. Nixon (*supra*), that where a lease contains a clause, that in case of a violation of any of its conditions, the relation of landlord and tenant, at the option of the former, shall wholly cease, and the landlord shall be entitled to, and receive immediate possession of the premises, under the statute for holding over after the expiration of the term, without any notice other than by the usual summons, that default in the payment of rent does not constitute such a holding over as to authorize summary proceedings to recover the premises under the statute referred to, and that such a clause creates a condition only, and not a conditional limitation, and that the estate is not absolutely determined by the breach ;

but in *Miller v. Levi* (44 N. Y. 489), it was held that a provision in a lease that the lessor may " terminate the lease at the end of any year, by giving sixty days' previous notice, in case he should sell, or desire to rebuild," is not a condition, *but a limitation*, and the term expires by force of a sale and notice in sixty days thereafter, and without any further act on the part of the lessor, and if the tenant retains possession after the sixty days elapse, this is such a case of holding over after the expiration of the term, within the provisions of the Revised Statutes, as will give jurisdiction in summary proceedings for his removal.

Under an agreement to quit on notice of ten days, it has been held that the date on which the notice is given must be excluded.

When certain leases expire.

The custom of the place determines whether a lease of premises from May 1, in one year, to May 1, in the succeeding year, includes or excludes the first day (*Wilcox v. Woods*, 9 *Wend.* 346), but a lease for years to end on May 1, expires at noon of that day, but a lease from a day named to May 1, expires on midnight on April 30 (*The People ex rel. Elston v. Robinson*, 39 *Barb.* 9); and where A executed to B a lease of certain premises for one year, containing a clause in these words: " B to have the privilege to have the premises for one year, one month and twenty days longer, but if he leaves he is to give four months' notice before the expiration of this lease, it was held, that the lease created a term for the full period of two years, one month and twenty days, defeasible at the election of the tenant, after one year, by giving notice of his intention to leave the premises, four months previous to the expiration of the year (*Cretien v. Doney*, 1 *N. Y.* 419; and see *House v. Burr*, 24 *Barb.* 525); and under a lease for a certain term yielding and paying a certain rent, and, at the election

of the tenant, for a further term, yielding and paying an increased rent, the election of the lessee to hold for the additional term at the increased rent may be inferred from his continuing to occupy the premises and paying rent for two quarters at the increased rate, without proof of any formal election or notice to the lessor at the time of the expiration of the first term, and the court in so deciding said: "The provision in the lease is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease *de futuro* requiring only the lapse of the preceding term and the election of the defendant to become a lease *in presenti*; all that is necessary to its validity is the fact of election (*Kramer v. Cook*, 7 *Gray (Mass.)* at p. 552; and see *ante*, pp. 27, 28, 29).

Without the landlord's permission.

The statute provides that the holding over of the tenant must be without the permission of the landlord (§ 28 subds. 1, 2, *ante*, p. 184), but this provision evidently contemplates a permission given under circumstances that make it irrevocable, and such as in law is tantamount to and possesses the elements of a valid contract, so as to bind the parties to it.

III.

Who to commence the proceedings.

As a rule proceedings under this statute should be commenced by the landlord, or some one on his behalf, or by the legal representatives or assignees of the landlord, entitled to possession of the demised premises.

And where a landlord prior to the expiration of an existing tenancy, has let premises to another, the question presents itself, whether the proceedings ought to be

commenced by the landlord, or by the tenant entitled to possession under the last demise. The question incidentally came up in the commission of appeals, in the matter of the application of Charles G. Miller, landlord, *v. Emanuel Levi*, tenant (44 *N. Y.* 489), in which it appeared that the landlord had sold the reversion, conditioned upon the delivery of possession to the vendee, and the court held, that the legal title not having actually passed, the relation of landlord and tenant was not terminated, and that proceedings to dispossess were properly brought in the name of the original lessor, and the court (*per Hunt, Com'r*), says: "There is no foundation for the objection that the relation of landlord and tenant did not exist. The relation was established by the express agreement of the parties in writing. The plaintiff remained the owner of the premises. Although he had made a contract of sale with Alexander & Black, the sale had not been consummated by the delivery of the deed. Indeed, the sale was conditional upon the delivery of possession, and the vendees refused to accept the deed or to execute their mortgage, until the possession of the premises was delivered to them. Some of the cases intimate that on the occurrence of a sale, this relation exists between the tenant and the purchaser, and that proceedings under this act may be instituted by the latter. None of them, however, intimate that the proceeding may not be in the name of the original lessor, he still retaining the legal title (citing *Gardner v. Keteltas*, 3 *Hill*, 330; *Birdsall v. Phillips*, 17 *Wend.* 464). It certainly seems to be the correct principle that the possession of property should be returned to the original parties from whom it was obtained, if they remain the landlords, and as such demand it, particularly where, as in the case above cited, they are under agreement to give the vendee or new tenant actual possession.

IV.

Further liability of overholding tenant—Increased rent after notice.

In *Despart v. Walbridge* (15 *N. Y.* 374), the tenant being notified by the lessor's assignee that if he held over, he must pay an increased rent, was held to have assented thereto by merely continuing to occupy after his lease expired (see also *Hunt v. Bailey*, 39 *Mo.* 257; *Adriance v. Hafkemeyer*, *Id.* 134; *Dorril v. Stephens*, 4 *McCord*, 59; *McKinney v. Peck*, 28 *Ill.* 174; *Bennett v. Ireland*, *Ellis, B. & E.* 326). But this principle was held not to apply where a tenant succeeded a prior tenant, and agreed for a certain rent, but paid only at the rate the former tenant had paid, and the lessor was allowed to recover the balance of rent agreed to be paid (*Mayor v. Tyler*, 8 *Q. B.* 95).

V.

Tenancies at will and by sufferance.

The character of these tenancies is fully discussed at p. 10 (*ante*), and the manner of terminating them is stated at pp. 15, 16 (*ante*).

Upon the subject of notice to tenants by sufferance, the commission of appeals held in *Smith v. Littlefield* (51 *N. Y.* 539), that a tenant who holds over a definite term for a brief period, without the consent of the landlord, does not thereby become tenant by sufferance, and is not entitled to notice to quit before the commencement of summary proceedings or the bringing of an action to recover possession. That to entitle him to notice, the holding over must be continued for such a length of time and under such circumstances as to authorize the implication of assent upon the part of

the landlord. Accordingly, where it appeared that the defendant entered into possession of certain premises under a lease, which expired April 18, 1865, and held over without the permission of the plaintiff, his landlord, until June 18, when the action was commenced to recover possession, and no notice to quit was served, it was held, that no notice was necessary, and that the plaintiff was entitled to recover.

Land sold under execution.

The application for process to dispossess in these cases may be made by any one having title—it is not confined to the purchaser at the sale (*Brown v. Betts*, 13 *Wend.* 30), and the proceedings may be had against the servant or agent of the debtor, or against a third person who entered in possession under title derived from the debtor subsequent to the attaching of the lien of the judgment under which the property was sold (*Hallenbeck v. Garner*, 20 *Wend.* 22). Where a tenancy at will exists, and the landlord, whose interest in the estate has been sold under an execution, executes a *quit claim* to the purchaser, who subsequently obtains title under the sheriff's sale, the tenancy is not determined so far but that the purchaser may proceed to obtain possession under the statute respecting *summary proceedings* to recover the possession of land, and the purchaser was entitled to proceed without the landlord's deed (*Birdsall v. Phillips*, 17 *Wend.* 463).

CHAPTER XXVIII.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS—
Continued.

- I. The affidavit—its requisites.
- II. The form of the affidavit.

I.

The affidavit and its requisites.

The affidavit upon which summary proceedings are to be commenced should be prepared with great strictness, and every fact necessary to give jurisdiction should be distinctly alleged (*Campbell v. Mallory*, 22 *How.* 183; *Hallenbeck v. Gardner*, 20 *Wend.* 22; *Powers v. Witty*, 42 *How.* 352). It should make out a plain, direct, and full case, and not be uncertain or contradictory (*Wiggin v. Woodruff* 16 *Barb.* 474; 22 *How.* 183; 24 *Barb.* 438; 42 *How.* 353; 43 *Barb.* 168, *aff'd* in 38 *N. Y.* 451; 6 *Hill*, 314; 5 *How.* 95), for the law will presume that the landlord has stated his case in the most favorable manner to his own interest; the landlord should therefore see that the facts favoring his right are fully set out, remembering that the affidavit must allege *facts* and not the evidence of facts, nor conclusions either of law or fact (*Hill v. Stocking*, 6 *Hill.* 317). In view of the importance of the case last cited, it was thought advisable to insert the same *in extenso*, as it appears in the books.

Syllabus of case.

In summary proceedings to recover possession of demised premises, under 2 *R. S.* 512, § 28, *et seq.*, the preliminary affidavit of the landlord or his agent must make out a plain case. Per *BRONSON, J.*, where the proceedings were instituted by S., and the affidavit stated that J. demised the premises, &c.; that he afterwards died leaving S. his widow; that she *became legally entitled to receive the accruing rents,*

and to have possession of the premises, without setting forth any fact explaining how she became entitled; *held*, not sufficient to show her right to proceed.

So, even though the affidavit state further that the tenant and those claiming under him have *recognized the widow's right to the premises, by paying rent to her, and by other acts.*

The affidavit should show, among other things, that the person intended to be removed is in the occupation of the premises, together with his relation to the landlord; and the summons should be directed to the occupant *by name*.

Where the affidavit was of a holding over by W. (the lessee), *or his assigns or those claiming under him or them*, on which the officer issued a summons directed to W. *or any other person claiming possession of the premises*, and it appeared that W. was not in possession, but that the premises were occupied by H., upon whom the summons was served; *held*, that the proceedings were void as against H, for want of jurisdiction.

Report of the case.

On April 12, 1842, William Ketcham went before a Supreme Court commissioner at Buffalo, and made affidavit as follows: "William Ketcham of said city, agent of Sarah B. Stocking of the same place, being duly sworn, deposes and says, that on or about the 24th day of January, A. D. 1834, Joseph Stocking, in his lifetime, since deceased, leased and rented unto Nathaniel Wilgus of said city, for the term of eight years from April 1, then next, the land and premises, &c. (describing certain premises in the city of Buffalo, and referring to the lease then in the deponent's possession); and this deponent further says, that the term granted in and by the said lease has expired; and that the said Wilgus, *or his assigns, or those claiming under him or them*, hold over and continue in possession of said premises, without the permission of this deponent or the said Sarah B. Stocking. Deponent further says, that the said Joseph Stocking departed this life on or about September 3, 1835, leaving the said Sarah B. Stocking his *widow*, him surviving; that after the death of the said Joseph Stocking, the said Sarah B. Stocking *became legally possessed* of the said lease, and entitled to receive the accruing rents pursuant to the terms of the said lease, and is now entitled to the

possession of the said premises. Deponent further says, that since the death of the said Joseph, the said Wilgus, *and those claiming under him*, have, by paying rent to the said Sarah, and other acts, recognized her right to the said premises and to receive the rents thereof."

Upon this affidavit the commissioner issued a summons directed as follows: "To *Nathaniel Wilgus* of the city of Buffalo, *or any other person claiming possession of the premises* hereinafter mentioned." The summons, after reciting part of the affidavit of Ketcham, proceeded thus: "Therefore in the name of the people, &c., *you and those claiming under you* are hereby summoned and required," &c. Wilber, a constable, to whom the summons was delivered, made affidavit on the summons that he had served the same by giving personal notice thereof to Wilgus; "also by leaving a copy thereof with *Milo W. Hill, who claims possession of a portion of the premises within described.*" Hill appeared and made objections to the sufficiency of the affidavit and summons, which were overruled by the commissioner; and such proceedings were further had that Hill was put out of possession by virtue of a warrant afterwards issued. He thereupon removed the proceedings into this court by *certiorari*.

J. B. Lathrop, for Hill.

B. S. Spalding, for S. B. Stocking.

BY THE COURT.—BRONSON, J.—The affidavit of Ketcham was not sufficient to give the commissioner jurisdiction. It was not a proceeding to remove Wilgus, the lessee, for he was not in possession. But the object was to remove Hill, who was in possession, and who has in fact been removed, and yet he is not named in the affidavit. The allegation is, that "Wilgus, or his assigns, or those claiming under him or them

hold over." Upon this a roving commission was issued to summon Wilgus, "or any other person claiming possession of the premises." It was thus referred to the constable to determine who was the proper party; and he returned, that he had served the summons by delivering a copy of it to *Hill*, "who claims possession." This is the first mention of *Hill* as the party intended to be affected by the proceeding. By the statute, any tenant or lessee, and the assigns, under-tenants, or legal representatives of such tenant or lessee, may be removed (2 R. S. 513, § 28). Unless the party is absent, the summons is to be served "by delivering to the tenant *to whom it shall be directed*, a true copy thereof, and showing him the original" (*Id.* § 32). The affidavit should have stated that *Hill* was in possession, and shown his relation to the landlord. And the summons should have been directed to him by name. But instead of that, the power of determining who was the proper party was in effect delegated to the constable. It will never do to sanction such a practice in these summary proceedings to put a man out of the possession of real estate. The affidavit was also bad for another reason. It does not show that Mrs. Stocking was the landlord or lessor (2 R. S. 513, § 29). The allegation is that Joseph Stocking was the lessor, and that he died in 1835, leaving Sarah B. Stocking his *widow*. It was not the widow, but the *heir* of Joseph Stocking, who was entitled to the reversion. There is a further allegation that Mrs. Stocking "became *legally* possessed of the said lease, and entitled to receive the accruing rents, &c., and is now entitled to the possession of the said premises." But how did she become entitled? The affidavit says, "*legally*." That is not swearing to a fact, but to the law; and it is quite possible the deponent may be mistaken about that, for the only facts which he states are, that the lessor is dead, and Mrs. Stocking is his widow. The affidavit should have shown that she was the legal representative of the lessor, by stat-

ing facts which would make out that relation, to wit, that she was assignee, heir, or devisee. Unless this is required, the occupant may be termed out of possession by a stranger. He has the right to deny any or all of the facts on which the summons issued, and have a trial by jury (*Id.* 514, § 34). This privilege is not worth much, if the moving party may swear to the law, without giving the facts on which his title depends.

The affidavit concludes by stating that "Wilgus, and those claiming under him, have, by paying rent to the said Sarah and other acts, recognized her right to to the said premises." This is subject to two objections. 1. It is not a statement of facts, but of evidence. It does not give her title, but only alleges that she has evidence tending to make out a title. 2. There is no allegation that Hill had ever recognized her title in any form. There is neither fact nor evidence against him.

When one man wishes to put another out of the possession of a dwelling or a store, upon an affidavit, and a notice of two hours—the time allowed to Hill—it is not too much to require that he shall make out a plain case in the preliminary affidavit; especially as he is allowed to be his own witness. These summary proceedings must be carefully watched, or they will be turned into the means of working injustice and oppression.

Proceedings reversed.

This case illustrates the danger of alleging conclusions instead of facts. It will be observed that the affidavit stated that J. demised the premises, &c., that he afterwards died leaving S. his widow, that *she became legally entitled to receive the accruing rents, and to have possession of the premises*, without setting forth any fact explaining how she became entitled; and that it was *held*, not sufficient to show her right to proceed, even though the affidavit stated further that the tenant and those claiming under him had *recognized the widow's*

right to the premises by paying rent to her, and by other acts (Ib). These statements were mere inferences or conclusions of the affiant, and the facts themselves should have been alleged so that the judicial mind might have legally determined from the facts stated whether the applicant's supposed right to maintain the proceeding was well founded in law. It should also plainly appear from the affidavit in order to give the magistrate jurisdiction, that the conventional relation of landlord and tenant created by agreement and not by operation of law, exists between the parties, specifying which is landlord and which is tenant (*Benjamin v. Benjamin*, 5 *N. Y.* 383; *Mitchell v. Simpson*, 28 *N. Y.* 55; *Roach v. Cosine*, 9 *Wend.* 227; *Sims v. Humphrey*, 4 *Den.* 185; *The People v. Bigelow*, 11 *How. Pr.* 83; *Wright v. Mosher*, 16 *How.* 454; *Russell v. Russell*, 32 *Id.* 400; *Deuel v. Rust*, 24 *Barb.* 438; *Buck v. Binninger*, 3 *Id.* 391; *People v. Matthews*, 43 *Id.* 168, affirmed in 38 *N. Y.* 451; *People v. Annis*, 45 *Barb.* 304; *Hallenbeck v. Garner*, 20 *Wend.* 22); and where it appeared upon the face of the affidavit that the person described as tenant entered into possession of the land as a purchaser, and refused to pay the purchase money, it was held that the statute did not embrace such a case, as there was no relationship of landlord and tenant existing between the parties (*The People ex rel. Williams v. Bigelow*, 11 *How.* 83).

The act provides (*vide* § 29, *ante*, p. 186), that any landlord or lessor, his legal representatives, agents, or assigns, may make oath in writing of *the facts* which, according to the preceding section, authorize the removal of a tenant, describing therein the premises claimed, and may present the same to one of the officers authorized to entertain such proceedings, and although the affidavit may be made by the agent of these respective parties (*Id.*), yet the agent must swear affirmatively that he is such agent; merely describing himself as such is not sufficient (*Cunningham v. Goe-*

let, 4 *Den.* 71; and see 7 *Hill.* 177; 1 *How.* 75; and 1 *Den.* 662); and if the proceeding be for non-payment of rent, the affidavit need not state the date nor duration of the lease (*The People v. Teed*, 48 *Barb.* 424; S. C. 33 *How.* 238). The affidavit should show with reasonable certainty that the tenant is in possession of the premises (*Smith v. Huestis*, *Hill & Den. Sup.* 236; *Deuel v. Rust*, 24 *Barb.* 438; *Rogers v. Lynd*, 14 *Wend.* 172); and where the proceedings are against several persons, it should distinctly show which of the persons proceeded against is tenant, and which of them are under-tenants (*Wiggin v. Woodruff*, 16 *Barb.* 474; S. C. 11 *N. Y. Leg. Obs.* 89), and should allege the holding over to be without permission (*Campbell v. Mallory*, 22 *How.* 183; *Prouty v. Prouty*, 5 *How.* 81, 95; 20 *Wend.* 103); and must show that the premises are within the jurisdiction of the officer before whom the proceeding is instituted (*The People v. Boardman*, 4 *Keyes*, 59), and must describe the premises intelligently (*Campbell v. Mallory*, 22 *How.* 183).

Rights and remedies of grantees, assignees, and representatives.

As to the rights and remedies of grantees and assignees, *vide* pp. 76, 96 (*ante*), and as to who are assignees, and as to their liabilities, *vide* pp. 83, 84, 85 (*ante*).

Who are legal representatives.

As to who are the legal representatives contemplated by the statute, *vide* p. 75, 76, *ante*, title *Remedies of Executors*; and the affidavit in proceedings brought by heirs-at-law or executors should state fully all the facts, giving them the title and right of possession, and administrators can not maintain summary proceedings unless the title of their intestate was of a leasehold estate only, in which case that fact should be stated in the affidavit (*vide ante*, pp. 75, 76, 96, 214, 215).

Sufficiency of affidavit. Tenancy at sufferance.

As to sufficiency of affidavit in the case of a tenancy at sufferance, see *The People v. Ulrich* (2 *Abb. Pr.* 28).

Description of premises.

Runnington on Ejectment, at page 121, says: A learned judge is reported to have said, that "he never

could understand the manner of reasoning so often urged, that the description must necessarily be *so certain*, that the sheriff might be exactly able to know, without any information from the plaintiff, of *what* to give possession, which was not true ; for such precision was not necessary in ejectment." Thus an ejectment was sustained for an orchard, because it is a word of certain signification ; though in a *præcipe* it must be demanded by the name of a garden ; and being well enough understood, the sheriff might with certainty deliver it in execution. So, and for the same reasons, for a stable and a cottage. Of a house, is good, though in the *præcipe* it ought to be demanded by the name of a messuage. The ejectment is an action of trespass in its nature, and trespass has been uniformly maintained, for breaking or entering a *house*. Besides, the import of the word *domus* is well understood in the law ; for instance, in action of *waste*, wherein it may be recovered, besides damages. So, of a chamber in the second story of a house, has been held good, there being certainty enough to direct the sheriff in the execution. In that case it was said, an ejectment *de una rooma*, has been adjudged good. It has even been held that an ejectment for part of a house in A, is well enough. But an ejectment for a *kitchen* has been determined to be bad ; for though the word be well understood in common parlance, yet because any chamber in a house may be applied to that use, the sheriff hath not certainty enough to direct him in the execution ; and the kitchen may be changed between judgment and execution. So it lies not of a *close*, because that is of uncertain extent ; nor will it aid the declaration, it is said, though the close be called by a particular name ; because that also leaves the extent of it so uncertain, that the sheriff can not tell the quantity of land to deliver in execution. For the same reason, it lies not of a piece of land. Nor for the third part of a close, or the fourth part of a

meadow, without setting forth the particular contents, or number of acres. And the number of acres should be expressed with certainty ; and therefore it is said that an ejectment for forty acres of land, by *estimation*, was not good. And though the number of acres contained in the close, or piece of land, should be mentioned in the declaration, and be set forth as belonging to a messuage for which the ejectment is also brought, yet even *that* was held too general ; because the nature and quality of the land was thereby left uncertain, so that the sheriff still must be at a loss *what* to deliver possession of, whether meadow, pasture, &c. These rules in actions of ejectment may by analogy throw some light upon the question of the particularity required in describing premises claimed in summary proceedings, and the general rule may be said to be that the description of the premises should be stated if possible with sufficient certainty to enable the officer to deliver possession of the premises claimed without requiring information outside of the papers. In cases where real estate has been sold under execution, the facts must be alleged with particularity (*Hallenbeck v. Garner*, 20 *Wend.* 22).

The affidavit may be sworn to before any person authorized to administer an oath.

II.

Forms of affidavits in summary proceedings.

[*Form No. 1.*]

Landlord's affidavit on proceeding for non-payment of rent on personal demand.

State of New York, city and county of New York, ss.

John Doe of said city being duly sworn, says, that he is the landlord of the premises hereinafter mentioned, and that, as such, he entered into an agreement with Richard Roe as tenant, and that by the terms of the said agreement the said tenant hired from deponent as such landlord, the five rooms on the second floor in the dwelling situated number 1 Broadway, in the city of New York, and he, the said tenant,

in and by the said agreement, undertook, and promised to pay this deponent, as rent, the sum of fifty dollars per month, payable monthly in advance, for the use and occupation of said premises; that on the 1st day of November, 1875, there was due, under and by virtue of said agreement, the sum of fifty dollars for one month's rent of the premises before described; to wit: from the 1st day of November, 1875, to the 1st day of December, 1875;* and this deponent further says, that he has demanded the said rent from the said tenant, since the same became due, and that the said tenant has made default in the payment thereof, pursuant to the agreement under which the premises are held; and that the said tenant † holds over, and continues in possession of the same, without the permission of the landlord, after default in the payment of the rent as aforesaid.

JOHN DOE.

Sworn before me, this 2nd day of }
November, 1875.

JOHN SMITH,
Notary Public N. Y. Co.

[Form No. 2.]

Affidavit by agent of landlord.

State of New York, city and county of New York, ss.

Thomas Jefferson being duly sworn, says that he is the agent of John Doe in respect to the premises hereinafter mentioned, and that the said John Doe is landlord of said premises, and that the said landlord entered into an agreement with Richard Roe as tenant, by the terms of which the said tenant hired from the said landlord, the five rooms on the second floor in dwelling situated No. 1 Broadway, in the city of New York, and he the said tenant, in and by the said agreement, undertook and promised to pay the said landlord as rent the sum of fifty dollars per month, payable in advance, for the use and occupation of said premises; that on the 1st day of November, 1875, there was due, under and by virtue of said agreement, the sum of fifty dollars for one month's rent of the premises before described, to wit: from the 1st day of November, 1875, to the 1st day of December, 1875, and this deponent further

* Where the demand is not personal, but is made by the service of a three days' notice, insert the following statement of the fact of service in the affidavit at the place indicated by the star (*), viz.:—"by the service of a notice in writing, on the day of 1875, pursuant to the statute, requiring the payment of the said rent, so due as aforesaid, within three days thereafter, or the possession of said premises, and which notice was served upon the said tenant by (*This notice may be served in the manner prescribed for the service of the summons in the 32nd section of the act, vide page 187, ante, and for form of proof of service, see chapter XXIX., post, and the landlord's affidavit should show the particular manner of service, and as to form of three days' notice, vide ante, p. 224.*)

† Where there are under-tenants in possession, the landlord's affidavit, in alleging the holding over of the tenant, should state "and that the said tenant, and *John Jones and Mary Smith, as under-tenants*, hold over and continue in possession, &c.," as in the landlord's affidavit.

says, that he has demanded the said rent from said tenant, since the same became due: and that the said tenant has made default in the payment thereof, pursuant to the agreement under which the said premises are held; and that the said tenant holds over and continues in the possession of the same, without the permission of the landlord after default in the payment of the rent as aforesaid.

Sworn to before me, the 2nd day of } THOMAS JEFFERSON.
November, 1875. }

JOHN SMITH,
Notary Public N. Y. Co.

When the affidavit is made by the agent he must swear affirmatively that he is such agent; merely describing himself as such is not sufficient (*Cunningham v. Goelet*, 4 *Den.* 71; and see 7 *Hill*, 177; 1 *How.* 75; 1 *Den.* 662).

[*Form No. 3.*]

Affidavit of landlord on expiration of tenant's term.

State of New York, city and county of New York, ss.

John Doe, being duly sworn, doth depose and say, that he is the landlord of the premises hereinafter described, and that on or about the 1st day of October, 1875, he rented unto Richard Roe, the second floor of premises, No. 1 Broadway, in the city of New York, for the term of one month commencing on the 1st day of October, 1875, and ending on the 1st day of November, 1875, which said term has expired, and that the said tenant holds over and continues in possession of the said premises, without the permission of the said landlord, after the expiration of the tenant's term therein.

JOHN DOE.

Sworn before me, this 2nd day of }
November, 1875. }

JOHN SMITH,
Notary Public N. Y. Co.

[*Form No. 4.*]

Like affidavit in case of tenancy at will.

State of New York, city and county of New York, ss.

John Doe, being duly sworn says: That on or about the 1st day of September, 1875, he let and rented unto Richard Roe, during the will and pleasure of deponent, the house and premises known as No. 1 Broadway, in the city of New York. And that the said Richard Roe, has held and occupied the said premises, as the tenant at will of this deponent, until the expiration of such tenancy, as hereinafter mentioned. And deponent further says that he caused notice in writing to be served on the said Richard Roe, in due form of law, on the 1st day of October, 1875, requiring the said Richard Roe, to remove from the said premises on or before the 1st day of November, 1875. That the time within which the said Richard Roe was required so to re-

move, has expired: and that the said Richard Roe holds over and continues in possession of the said premises, after the expiration of such time, without the permission of the deponent, his landlord.

JOHN DOE.

Sworn to before me this 2nd day of }
November, 1875. }

DANIEL T. ROBERTSON,
Notary Public N. Y. Co.

See form of one month's notice to quit, p. 16, *ante*.

[Form No. 5.]

Like affidavit in case of sale under execution.

State of New York, city and county of New York, ss.

John Doe, being duly sworn, says: That at the time of the sale herein-after mentioned, Richard Roe was the owner, and in possession of the real estate and premises known as No. 1 Broadway in the city of New York. That on the 1st day of June, 1874, this deponent recovered a judgment against the said Richard Roe, in the Marine Court of the city of New York, for \$500 damages and costs. That the said judgment was duly made and given, and that on the same day, a transcript of said judgment was duly docketed in the office of the clerk of the city and county of New York; and that thereafter and on the same day, an execution upon the said judgment was duly issued to the sheriff of the city and county of New York (the county within which the said premises were situated), commanding the said sheriff to collect said judgment out of the personal property of the judgment debtor within his said county, and that if sufficient personal property could not be found, then out of the real property of said judgment debtor, in his said county, and that the said sheriff, being unable to find sufficient personal property of the said debtor, levied upon the real estate and premises hereinbefore mentioned, and that after duly advertising the same for sale, in the manner and in the form, and for the time prescribed by the statute in such case made and provided, the said sheriff, on the 21st day of July, 1874, sold the said real estate and premises, under the said execution at public auction unto this deponent for the sum of \$100, that being the highest sum bidden for the same. And that the said sheriff thereupon executed unto this deponent the certificate of sale required by said statute, which said certificate was duly filed in the office of the clerk of the city and county of New York, and that thereafter, to wit, on the 25th day of October, 1875, deponent's title under such sale was fully perfected by the execution and delivery by said sheriff of the deed upon such sale, which said deed conveyed said premises to this deponent, and that the same was duly acknowledged and recorded in the office of the Register of the city and county of New York, and that after said title was fully perfected, this deponent at the said premises demanded the possession thereof from the said Richard Roe under and by virtue of said title, and that the said Richard Roe refused to surrender such possession, and that he holds over and continues in possession of the said premises after the perfection of such title, under said execution

sale and after such demand aforesaid, without permission of this deponent, who is entitled to the possession thereof.

JOHN DOE.

Sworn to me this 1st day of }
November, 1875. }

DANIEL T. ROBERTSON,
Notary Public N. Y. Co.

[The demand for possession may be made in writing.]

[Form No. 6.]

Like affidavit in case of sale under foreclosure of mortgage.

State of New York, city and county of New York, ss.

John Doe, being duly sworn says: That at the time of the execution of the mortgage hereinafter mentioned, Richard Roe was the owner in possession of the real estate and premises known as No. 1 Broadway, in the city of New York. That on the 1st day of June, 1874, the said Richard Roe executed, acknowledged, and delivered unto this deponent, an instrument under his hand and seal, whereby he granted and conveyed the said premises unto this deponent as security for the payment of \$1,000 and interest within six months thereafter. That at the expiration of said term, default was made in the payment of said principal sum and interest, whereupon this deponent commenced an action, in the Supreme Court of the state of New York, in and for the city and county of New York, in which said action such proceedings were had, that after the said mortgagor and all persons having subsequent liens or claims upon or to said premises were brought before the said court as parties to said action, judgment was on the 2nd day of January, 1875, duly made and given in favor of this deponent as plaintiff therein against the said defendants therein for the foreclosure and sale of said property, by the sheriff of the city and county of New York.

That thereafter and on the 10th day of February, 1875, the said sheriff of the city and county of New York, under and pursuant to said judgment sold the said property at public auction unto this deponent for \$100, he being the highest bidder, and that being the highest sum bidden for the same, and that thereafter and on the 1st day of March, 1875, the sale under said judgment was perfected by the execution and delivery by said sheriff, of a deed of said premises to this deponent, conveying to him the title to said premises in fee simple, which deed was duly recorded in the office of the Register of the city and county of New York, and that this deponent after said title was fully perfected demanded possession of the said premises from said Richard Roe, under and by virtue of said title, and that the said Richard Roe refused to surrender such possession, and that he holds over and continues in possession of the said premises after the perfection of said title under said foreclosure proceedings, and after such demand aforesaid, without permission of this deponent, who is entitled to the possession thereof.

JOHN DOE.

Sworn to before me this 1st day of }
November, 1875. }

DANIEL T. ROBERTSON,
Notary Public N. Y. Co.

[The demand for possession may be made in writing.]

[Of course, these various affidavits must be drawn with reference to the peculiar facts of each case, and these forms are merely given as outlines to aid in such preparation.]

CHAPTER XXIX.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS—

Continued.—THE SUMMONS AND ITS SERVICE.

- I. The summons.
- II. Its form.
- III. The service.
- IV. Proof of service.

I.

The summons.

The statute provides that on receiving the necessary affidavit, the magistrate shall issue his summons, describing the premises of which possession is claimed, and requiring any person in possession of said premises, or claiming the possession thereof, forthwith to remove from the same, or to show cause before the said magistrate, at a certain time to be named, why possession of said premises should not be delivered to the applicant (§ 30 *Id. ante*, p. 186). The statute does not prescribe any particular form of summons, and imposes only the above requisities. It is customary, however, for the magistrate to describe his office, so as to show on the face of the summons that he is one of the magistrates authorized to issue it, although a misdescription of his office was in one case disregarded (*McCarthy v. Noble*, 5 *Leg. Obs.* 380). The summons is process, and must be issued in the name of the people (2 *Edm. R. S.* p. 285, § 8), and the same statute, § 9, provides that “all writs, process, proceedings, and records in any court within this state, shall be in the English language (except that the proper and known names of process, and technical words, may be expressed in the language

heretofore and now commonly used), and shall be made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated ; but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner."

It has been customary, and is prudent, if not necessary, to recite, in the summons all the jurisdictional facts.

The summons must be directed to the tenant by name (*Hill v. Stocking*, 6 *Hill*, 316 ; *Deuel v. Rust*, 24 *Barb.* 439 ; 20 *Wend.* 23), and a mere clerical error in spelling it will be disregarded (*McCarthy v. Noble*, 5 *Leg. Obs.* 380), and where the proceeding is against several persons, it should like the affidavit designate which of them is tenant, and which of them are under-tenants (*Wiggin v. Woodruff*, 16 *Barb.* 474), and must be returnable before the magistrate, within the territorial limits of his jurisdiction.

Time of return.

If the proceeding be for holding over after the expiration of the term, the magistrate, if the summons be issued on the day the term expires, or the day next thereafter, may direct such summons to be made returnable on the same day, at any time after twelve o'clock noon, and before six o'clock in the afternoon ; in other cases it must be made returnable within such time as may be reasonable, not less than three nor more than five days (*vide* § 30, *ante*, p. 186, 30 *How.* 93).

II.

*The form of summons.***Summons—Non-payment of rent on landlord's affidavit.***[Form No. 7.]*

Summons.—Non-payment of rent.—Landlord.—Personal demand.
To Richard Roe, tenant; and each and every person in possession of the demised premises hereinafter mentioned, or claiming the possession thereof:

Whereas, John Doe has made oath in writing, and presented the same to me, that he is the landlord of the premises hereinafter mentioned; and that he entered into an agreement with you, and by the terms of said agreement, you, as tenant, hired from him, as landlord, the five rooms on the second floor in dwelling situated number 1 Broadway, in the city of New York; and that you, in and by the said agreement, undertook and promised to pay to him as rent the sum of fifty dollars per month, payable monthly in advance, for the use and occupation of said premises; that on the first day of November, 1875, there was due, under and by virtue of the said agreement, the sum of fifty dollars, for one month's rent of the premises before described, to wit: from the 1st day of November, 1875, to the first day of December, 1875; that the said rent has been demanded of you by the said landlord, since the same became due, and that default has been made in the payment thereof, pursuant to the agreement under which the said premises are held; and that you as tenant hold over and continue in possession of the same, without the permission of the landlord, after default in the payment of the rent as aforesaid.

Therefore, in the name of the people of the state of New York, you are hereby summoned and required forthwith to remove from the said premises, or show cause before me, at the court house, southwest corner of Chambers and Centre streets, in the city of New York, on the 5th day of November, 1875, as ten o'clock in the forenoon, why the possession of the said premises should not be delivered to the landlord.

Witness my hand this 2d day of November, 1875.

DENIS QUINN,
Justice of the District Court of the city of New York,
for the First Judicial District.

*[Form No. 8.]***Summons against tenant and under-tenants for non-payment of rent—upon affidavit of agent.**

To Richard Roe, tenant, and David Jones and Paul Jones, under-tenants, and each and every person in possession of the demised premises hereinafter mentioned, or claiming the possession thereof:

Whereas, John Peterson has made oath in writing, and presented

the same to me, that he is the agent of John Doe, who is the landlord of the premises hereinafter described; and that the said landlord entered into an agreement with you as tenant, and by the terms of the said agreement, you, the said Richard Roe, hired from him as landlord, the five rooms on the second floor in dwelling situated number 1 Broadway, in the city of New York, and that you, said tenant, in and by the said agreement, undertook and promised to pay to said landlord the sum of fifty dollars, per month, payable monthly in advance, for the use and occupation of said premises; that on the 1st day of November, 1875, there was due, under and by virtue of said agreement, the sum of fifty dollars for one month's rent of the premises before described; to wit, from the 1st day of November, 1875, to the 1st day of December, 1875, that the said rent has been demanded of you, said tenant, since the same became due, and that default has been made in the payment thereof, pursuant to the agreement under which the said premises are held; and that you, Richard Roe, as tenant, and David Jones and Paul Jones, as under-tenants, hold over and continue in possession of the same, without the permission of the landlord, after default in the payment of the rent as aforesaid. Therefore, in the name of the people of the state of New York, you, and each of you, are hereby summoned and required forthwith to remove from the said premises, or show cause before me, at the court house, at the southwest corner of Chambers and Centre streets, in the city of New York, on the 5th day of November, 1875, at ten o'clock in the forenoon, why the possession of the said premises should not be delivered to the landlord.

Witness my hand this 2nd day of November, 1875.

DENIS QUINN,

Justice of the District Court of the city of New York,
for the First Judicial District.

[Where the demand is not personal, but is made by the service of a three days' notice, the summons ought to recite the mode of demand stated in the affidavit, although not perhaps with the same particularity.]

[*Form No. 9.*]

Summons for holding over, upon affidavit of landlord.

To Richard Roe, tenant.

Whereas, John Doe has made oath in writing, and presented the same to me, that he is the landlord of the premises hereinafter described, and that on or about the 1st day of October, 1875, he rented unto you, Richard Roe, the second floor of premises No. 1 Broadway, in the city of New York, for the term of one month, commencing on the 1st day of October, 1875, and ending on the 1st day of November, 1875, which said term has expired, and that you hold over and continue in possession of the said premises, after the expiration of your term therein, without the permission of the landlord.

Therefore, in the name of the people of the state of New York, you are hereby summoned and required forthwith to remove from the said premises, or show cause before me at the court-room, southwest corner of Chambers and Centre streets, in the city of New York, on

the 2d day of November, 1875, at three o'clock in the afternoon, why possession of the said premises should not be delivered to the landlord.

Witness my hand, this 2d day of November, 1875,

DENIS QUINN,
Justice of the District Court of the city of New York
for the First Judicial District.

[Form No. 10.]

Summons.—In case of tenancy at will.

To Richard Roe, tenant, and each and every person in possession of the demised premises hereinafter mentioned, or claiming the possession thereof :

Whereas, John Doe has made oath in writing, and presented the same to me, that on or about the 1st day of September, 1875, he let and rented unto you, during the will and pleasure of the said John Doe, the house and premises known as No. 1 Broadway, in the city of New York, and that you have held and occupied the said premises as the tenant at will of the said John Doe, until the expiration of such tenancy as hereinafter mentioned. And that the said John Doe caused notice in writing to be served upon you, in due form of law, on the 1st day of October, 1875, requiring you to remove from the said premises on or before the 1st day of November, 1875 ; that the time within which you were required to remove from said premises has expired, and that you hold over and continue in possession of the same, without the permission of the landlord, after the expiration of your term therein.

Therefore, in the name of the people of the state of New York, you are hereby summoned and required forthwith to remove from the said premises, or show cause before me at the court house, southwest corner of Chambers and Centre streets, in the city of New York, on the 2d day of November, 1875, at three o'clock in the afternoon, why the possession of the premises should not be delivered to the said landlord.

Witness my hand, this 2d day of November, 1875.

DENIS QUINN,
Justice of the District Court of the city of New York,
for the First Judicial District.

[Form No. 11.]

Summons in case of sale under execution.

To Richard Roe, and each and every person in possession of the demised premises hereinafter mentioned, or claiming the possession thereof :

Whereas, John Doe hath made oath in writing, and presented the same to me, that at the time of the sale hereinafter mentioned, you were the owner in possession of the real estate and premises known as No. 1 Broadway, in the city of New York. That on the 1st day of June, 1874, the said John Doe recovered a judgment against you, in the Marine Court of the city of New York, for \$500 damages and costs. That the said

judgment was duly made and given, and that on the same day a transcript of said judgment was duly docketed in the office of the clerk of the city and county of New York; and that thereafter and on the same day an execution upon the said judgment was duly issued to the sheriff of the city and county of New York (the county within which the said premises were situated), commanding the said sheriff to collect said judgment out of the personal property of the judgment debtor within his said county, and that if sufficient personal property could not be found, then out of the real property of said judgment debtor, in his said county, and that the said sheriff, being unable to find sufficient personal property of the said debtor, levied upon the real estate and premises hereinbefore mentioned, and that after duly advertising the same for sale, in the manner and in the form, and for the time prescribed by the statute in such case made and provided, the said sheriff on the 21st day of July, 1874, sold the said real estate and premises under the said execution, at public auction, unto the said John Doe for the sum of \$100, that being the highest sum bidden for the same; and that the said sheriff thereupon executed unto the said John Doe the certificate of sale required by said statute, which certificate was duly filed in the office of the clerk of the city and county of New York, and that thereafter, to wit, on the 25th day of October, 1875, the title of the said John Doe under such sale was fully perfected by the execution and delivery by said sheriff of the deed upon such sale, which said deed was duly acknowledged and recorded in the office of the Register of the city and county of New York; and that after said title was fully perfected, said John Doe, at the said premises, demanded the possession thereof from you under and by virtue of said title, and that you refused to surrender such possession, and that you hold over and continue in possession of the said premises, after the perfection of said title under said execution sale, and after such demand aforesaid, without permission of the said John Doe, who was entitled to possession thereof.

Wherefore in the name of the people of the state of New York, you are hereby summoned and required forthwith to remove from the said premises, or show cause before me at the court room, southwest corner of Centre and Chambers streets, in the city of New York, on the 4th day of November, 1875, at ten o'clock, forenoon, why the possession of the said premises should not be delivered to the said landlord and applicant.

Witness my hand, this 1st day of November, in the year 1875.

DENNIS QUINN,

Justice of the District Court of the city of New York,
for the First Judicial District.

[Form No. 12.]

Summons in case of sale under mortgage foreclosure.

To Richard Roe [and to each and every person, etc., as in the preceding form]:

Whereas, John Doe has made oath in writing, and presented the same to me, at the time of the execution of the mortgage hereinafter mentioned you were the owner in possession of the real estate and premises, known as No. 1 Broadway, in the city of New York; that on the 1st day of June, 1874, you executed, acknowledged, and delivered

unto the said John Doe, an instrument under your hand and seal, whereby you conveyed the said premises unto the said John Doe, as security for the payment of the sum of \$1,000 and interest, within six months thereafter; that at the expiration of said term default was made in the payment of the said principal sum and interest, whereupon the said John Doe commenced in action in the Supreme Court of the state of New York, in and for the city and county of New York, in which said action, such proceedings were had, that after the said mortgagor and all persons having subsequent liens or claims upon or to said premises were brought before the said court as parties to said action, judgment was on the 2nd day of January, 1875, duly made and given in favor of this deponent as plaintiff therein, against the said defendants therein, for the foreclosure and sale of said property by the sheriff of the city and county of New York; that thereafter and on the 10th day of February, 1875, the said sheriff of the city and county of New York, under and pursuant to said judgment, sold the said property at public auction unto the said John Doe for \$100, he being the highest bidder, and that being the highest sum bidden for the same, and that thereafter and on the 1st day of March, 1875, the sale under said judgment was perfected by the execution and delivery by said sheriff of a deed of said premises, which deed was duly recorded in the office of the Register of the city and county of New York, and that this deponent, after said title was fully perfected, demanded possession of said premises from you under and by virtue of said title, and that you refuse to surrender such possession, and that you hold over and continue in possession of said premises after the perfection of said title under said foreclosure proceedings, and after such demand aforesaid, without permission of the said John Doe, who is entitled to the possession thereof. Therefore, in the name of the people of the state of New York, you are hereby summoned and required to forthwith remove from the said premises, or show cause before me, at the court house, at the southwest corner of Chambers and Centre streets, in the city of New York, on the 4th day of November, 1875, at 10 o'clock in the forenoon, why possession of the said premises should not be delivered to the landlord and applicant.

Witness my hand, the 1st day of November, 1875.

(Copy.)

DENIS QUINN,

Justice of the District Court of the city of New York,

for the First Judicial District.

[Of course, these various summonses must follow the affidavit as to the peculiar facts of each case, and these forms are merely given as outlines to aid in the preparation of the papers.]

[Form No. 13.]

Endorsement upon summons.

The following is the form of endorsement required to be placed upon the copy of the summons intended for service (1868, ch. 828, § 3):

"LAWS OF NEW YORK.

Chapter 828.

Act relative to Summary Proceedings.

Passed May 19th, 1868.

§ 3. It shall be the duty of every person to whom a copy of a summons shall be delivered in pursuance of subdivision two or three of section thirty-two of title ten, chapter eight, part three of the Revised Statutes, to deliver such copy to the tenant to whom the same is directed, or, if such tenant can not be found, to his agent for the demised premises, without any avoidable delay: and a copy of this section shall be written or printed upon the outside of every such copy. If neither the tenant nor his agent can be found for that purpose, then the person to whom such copy is delivered shall take the same to the magistrate by whom the summons is issued, at the time and place named therein, and inform him that the tenant can not be found. Every person who shall willfully violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not less than thirty days nor more than one year.

III.

The manner of service.

The statute prescribes the manner of service (*vide* § 32, *ante*, p. 187), and this must be literally followed in order to give jurisdiction, and an omission to show the original summons renders the service irregular (*Duel v. Rust*, 24 *Barb.* 438), and an affidavit of service was held defective, for not showing that the copy was left with a person of mature age, at the last or usual place of residence of the tenant (*The People v. Matthews*, 43 *Barb.* 168), and an affidavit in proceedings against A, of service upon B, residing on the premises, A being absent, is insufficient (*Cameron v. McDonald*, 1 *Hill*, 512); and an affidavit which alleged service on an under-tenant on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence was on the demised premises, was held to be insufficient to give jurisdiction (*People v. Platt*, 43 *Barb.* 116, *aff'd* in 38 *N. Y.* 451), and where the service is sworn to as being upon a date prior to that of the summons itself, the variance is fatal; it is not a mere clerical error that may be cor-

rected after judgment, for it leaves the case without any proof as to the time of service, and if accepted, would give possible effect to an illegal service (*The People v. Boardman*, 4 *Keyes*, 59), and where the summons is directed to the original lessee, service upon the under-tenant in possession only is not sufficient. Service should be made upon both (*Matter of Glern*, 1 *How.* 213).

Time of service.

The following decision reported in *The New York Daily Register*, October 27, 1875, is important upon the question of the time within which the summons must be served:

THE PEOPLE *ex rel.* HENRY A. FROST

v.

MARVIN'S SAFE COMPANY and JAMES

W. FOWLER.

} Landlord and Tenant.

Centiorari to review summary proceedings under the Landlord and Tenant act.

The only point made by the relator on the review was that the summons was served only two days before the day of its return. Section 2, ch. 828 of the Laws of 1868 (*Session Laws*, vol. 2, p. 1931), provides that "if the summons be returnable on the day on which it is issued, it shall be served at least two hours before the hour at which it is made returnable; and if not returnable on the same day, it shall be served at least two days before the day on which it is made returnable." The summons in this case was issued on the 21st day of November, 1874, and was returnable on the 25th day of that month. It further appeared in the case that the summons was served on the 23d day of the month, which was two days before the return day mentioned therein.

Held, that the summons conformed to the requirements of the statute, inasmuch as it was returnable in not less than three nor more than five days (§ 30, title 10, ch. 8, part 3, *Rev. Stat.*, as amended by ch. 460 of *Laws of 1851*, and § 1, ch. 828, of the *Laws of 1868*). That the service being on the 23d, and the summons returnable on the 25th, it was clearly sufficient to satisfy the requirements of ch. 828 of the Laws of 1868, above referred to.

Opinion by DAVIS, P.J.; DANIELS and DONOHUE, JJ., concurring.

IV.

Proof of service.

The proof of service is by affidavit, as indicated below. A form is given for each of the three different

modes of services allowed by the statute. It has been held however that a constable's oral evidence of the service of the summons is admissible before the justice, although the constable may have made an insufficient return by affidavit (*Robinson v. McManus*, 4 *Lansing*, 380).

Proof of personal service.

City and county of New York, ss.

being duly sworn, says that he did, on the _____ day of _____ of the said city, 187____, at _____ o'clock and _____ minutes in the _____ noon, at No. _____ street, in the said city, serve the within summons on _____ the tenant therein named, by delivering to h _____ personally, a true copy thereof, and at the same time showing h _____ the original, and that Chapter 828, Laws of 1868, was endorsed on the copy summons so served.
Sworn before me this _____ day of _____ 187____ }

Notary Public N. Y. Co.

[As to the facts required to be stated in this form, see § 32, subd. 1, p. 187, *ante*.]

Proof of service on person of mature age.

City and county of New York, ss.

being duly sworn, says that he did, on the _____ day of _____ of the said city, 187____, at _____ o'clock and _____ minutes in the _____ noon, serve the within summons on _____ the tenant therein named, by leaving a true copy thereof, at his place of residence, No. _____ street in the said city, with _____ who is a person of mature age, who, at the time of the said service, was on, and who resides on the said premises, at the same time showing h _____ the original, the said tenant being at the time absent from h _____ said place of residence, and that Chapter 828, Laws of 1868, was endorsed on the copy summons so served.
Sworn before me, this _____ day of _____ 187____ }

Notary Public N. Y. Co.

[As to the facts required to be stated in this form, see § 32, subd. 2, p. 187, *ante*.]

Proof of service upon conspicuous part of premises.

City and county of New York, ss.

city and county for New York, ss. of said city and county, being duly sworn, says that he did, on the day of 187 at o'clock and minutes in the noon, serve the within summons on the tenant therein named, by affixing a true copy thereof upon a conspicuous part—to wit, the entrance door—of the said demised premises in the within affidavit and summons described; that at the time of said service the said tenant was absent from his last or usual place of residence; that he could not find any person of mature age at such place residing on the premises; that he could not find the said tenant upon the said demised premises; and further, that he could not find upon said demised premises any person of mature age, residing thereon or connected therewith by employment in any business for which the said premises are used, on whom he could serve the same, and that Chapter 828, Laws of 1868, was endorsed on the copy summons so served.

Sworn to before me, this
day of 187

Notary Public N. Y. Co.

[As to the facts required to be stated in this form, see § 32, subd. 2, p. 187, *ante*.]

CHAPTER XXX.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS—
Continued. PRACTICE UPON RETURN DAY.

- I. Return of the process.
- II. Objections to sufficiency of papers.
- III. Filing counter affidavit.
- IV. Amendments in these proceedings.
- V. Demanding trial by jury.
- VI. Adjournments.

I.

Return of the process.

The landlord must see that the process is returned to the justice on the day of return with the proper return of service endorsed thereon, the forms of which are given on pp. 259, 260 (*ante*). If the return should prove defective, it may be amended at any time before judgment, and in one case the oral evidence of the constable was allowed to cure imperfections in his written return, and it has been held that the refusal of a defendant in an action in a justice's court, to appear in the action, after objections taken by him to the jurisdiction of the justice have been overruled, does not deprive the justice of the power afterwards to allow the amendment of the constable's return of the summons. The power of amendment does not depend upon the appearance of the defendant in the suit (*Perry v. Tynen*, 22 *Barb.* 137).

II.

Objection to sufficiency of papers.

The policy of the law seems to require that objections, particularly to matters of form, should be pre-

sented at the first opportunity, in order that the objection may be cured if it be in respect to a matter capable of amendment, and if it be a matter not susceptible of amendment, that the landlord may, upon being informed of his error, withdraw his proceeding, and commence *de novo*. A striking illustration of the rule is furnished by the case of *The People on the Relation of McGuire v. Ulrich* (2 *Abb. Pr.* 28), in which the New York Supreme Court, at general term, went to the extent of saying that even the failure to appear before the justice on the return of a summons in summary proceedings to remove a tenant, admits the right of the landlord, and precludes the tenant from afterwards objecting to irregularity in the proceedings on *certiorari*.

In another case, it was held that the appearance of the tenant before the justice without raising any objections, is a waiver of any defect in the affidavit upon which the proceedings are founded (*McCarthy v. Noble*, 5 *Leg. Obs.* 380; 4 *Den.* 185; compare 22 *How. Pr.* 183), and in *Cunningham v. Goelet* (4 *Den.* 71), it was held that a defect in not naming the tenant is not waived by his appearance *for the purpose of objecting to it*, but in that case the objection was expressly taken and was not, therefore, waived. Another illustration is furnished by the case of the estate of Samuel Norsworthy, deceased, *v. Bryan*, which came before the New York Supreme Court at general term, upon a *certiorari* from a judgment rendered by a District Court Justice, in summary proceedings. The case is reported in the 33 *Barbour S. C. R.* at p. 153, and the opinion as delivered by BONNEY, Justice, is as follows :

BY THE COURT—BONNEY, J.—The only questions to be considered in this case are those arising between the landlord and the tenant Bryan. Bradley, stated to be under-tenant, assented to the judgment rendered by the justice on summary proceedings, and has not appealed. With him we have nothing to do.

The appellant Bryan appeared, on the return of the summons, but filed no affidavit, and we have only to determine whether or not the affidavit by which the proceedings were initiated states facts sufficient to authorize the issuing of the summons and warrant for his removal. On examination of the affidavit it is found to state in substance and effect these facts:

1. That the "estate of Samuel Norsworthy, deceased," is landlord of the premises in question. 2. That Amerman, who made the affidavit, is agent of said landlord, in respect to said premises. 3. That the appellant (Bryan) is tenant of said premises, under an agreement made between him and said agent, at the annual rent of \$3,600, payable in monthly payments. 4. That said tenant, on January 18, 1859, when the affidavit was made, was indebted to said landlord in the sum of \$200, due January 1st, 1859, for balance of rent for one month, from December 1, 1858, to January 1, 1859, for said premises. 5. That demand of such rent had been made of the tenant by said agent, after the rent became due. 6. That said tenant has made default in the payment of said rent pursuant to the agreement under which the premises were held. 7. That said tenant held over, and continued in possession of said premises without the permission of the landlord, after such default in the payment of the rent. None of the facts stated in the affidavit were denied by the tenant, and the service of the summons being proved, and the tenant appearing pursuant thereto, the justice rendered judgment in favor of the landlord, and issued a warrant for the removal of the tenant, under which he was removed.

In my opinion the affidavit states all that is required by the statute (3 *R. S.* 5th ed. 836, § 28, &c.), to authorize the removal of a tenant, and the judgment of the justice should be affirmed. The appellant objects that the proceedings are in behalf of "The estate of Samuel Norsworthy, deceased," and insists that an estate can not be an actor. *As to this, it is only neces-*

sary to say that the affidavit states that "the estate of Samuel Norsworthy, deceased," is landlord of these premises, and that statement is not denied. Consequently it is admitted, and we can not go behind it. Whether "the estate of Samuel Norsworthy, deceased," is a corporation, or an individual, or an association of several individuals acting together under that name, *we can not now inquire.* *If the tenant had denied the statement in the affidavit, proof might have been produced to show that the estate of Samuel Norsworthy, deceased, was capable of being, and was in fact, landlord as stated.* It was also made ground of objection that the affidavit did not state that Bryan was either tenant at will or at sufferance, or for a year or years, or part of a year, and therefore was insufficient. To this it may be answered that if the hiring was precisely as stated in the affidavit, and nothing more, the tenancy, by law, would expire on the 1st day of May next after the making of the agreement. *And if the contract of hiring is not fully stated in the affidavit, the tenant should have supplied the defect, or made some objection to it for this reason.* It certainly was not necessary to state in the affidavit *how* the landlord acquired title to the premises, and it clearly does show that the relation of landlord and tenant was created between the parties by an agreement of hiring made by the tenant with the agent of the landlord, and that the tenant made default in the payment of rent after it was due, and after demand for payment thereof made. The statement that Bradley, under-tenant of part of the premises in question, holds over *with* (instead of without) permission of the landlord, if not to be treated as a clerical error (which in fact it clearly is, in my opinion), and amended, can not enure to the benefit of this appellant, against whom alone judgment was rendered.

The judgment should be affirmed, with costs.

In the *People v. Teed* (48 *Barb.* at p. 427), it was

objected that the return showed that the jury retired to deliberate upon their verdict, but did not show that an officer was sworn to keep the jury, &c., and the general term of the Supreme Court, in answering the objection, said: "The statute is directory in this respect. We can not infer that the jury were not kept by an officer, or that he was not sworn. The relator might have procured a further return, if the magistrate did, in fact, neglect the performance of his duty, and the relator had desired to make it appear. It was the duty of the magistrate to swear an officer, and it is the intendment, in the absence of proof to the contrary, that he performed his duty."

III.

Filing counter affidavit.

The statute provides that any person in possession of the demised premises, or any person claiming possession thereof, may, at the time appointed in the summons for showing cause, file an affidavit with the magistrate who issued the same, *denying the facts* upon which the summons was issued, or any of those facts; and that the matters *thus* controverted shall be tried by the magistrate, or by a jury, provided either party to such proceeding shall at the time designated in such summons for showing cause, demand a jury, and at the time of such demand, pay to such magistrate the necessary costs and expenses of obtaining such jury (*vide* § 34, *ante*, p. 189). This provision of the statute has given rise to the question of the proper construction of the words, "denying the facts upon which the summons was issued, or any of those facts," owing to the omission to provide for cases in which the tenant is obliged to admit the truth of all the facts alleged in the landlord's affidavit, and in which, notwithstanding such admission, he has still a perfect defense; for example, take the case of a tenant whose defense is payment; he can

not dispute the hiring, nor its terms, nor can he deny that the rent became due as alleged by the landlord, nor can he deny that the landlord demanded it, and these admissions substantially make out the landlord's case, and yet the tenant, after admitting all these facts, may have paid the landlord at the time he demanded the rent. The legislature did not intend to exclude this affirmative defense. Take another case: Suppose the tenant has been evicted by title paramount before the rent claimed accrued, and was, in consequence, compulsorily obliged to attorn and pay rent to the paramount owner, in order to protect his possession; the tenant could not, in such a case, deny any of the facts required to be stated in the affidavit of the original landlord, if he saw fit to institute a proceeding of dispossession, and still the tenant has a complete defense in law. The legislature did not intend to exclude such an affirmative defense. The denial contemplated by the statute, means the denial by the tenant of the landlord's claim for rent or possession by the pleading of facts, which of themselves constitute such denial, by showing that for some reason, recognized in law as valid, the claim made by the landlord, although it once existed, has, by reason of the facts alleged, ceased to exist; or, if the right never existed, the same result is accomplished by a simple denial of the facts alleged by the landlord. That this was the intention of the legislature, is manifest from the spirit if not from the language of the statute, particularly when construed with reference to the plea of the general issue under the system of pleading in use at the time the statute was passed; for under this plea almost every affirmative defense was admitted which went to defeat the plaintiff's claim. The modern system of pleading has, however, changed the former rule by requiring affirmative matter to be specially pleaded.

The question of pleading in these proceedings incidentally came up in the Court of Appeals, in the

case of *Geisler et al. v. Acosta* (9 *N. Y.* at pp. 231, 233), by an objection to the sufficiency of a plea of former adjudication, and the court, speaking of the counter affidavit (per DENIO, J.), said: "The first paper presented by Geisler and Wiegand did not profess to deny any of the facts upon which the summons was issued. It did not, therefore, raise any issue, to try which a jury could be summoned; and the magistrate was right in his decision to that effect. As a plea of a former trial, and determination of the same matter, supposing that such a defense could be interposed, the paper was defective," because it did not show what issue was tried, nor upon what ground the judgment pleaded proceeded. And WILLARD, J., was of opinion that the statute did not contemplate pleading in these proceedings.

The real question, however, decided by this case was the insufficiency and form of the counter affidavit itself, in not alleging the facts required in a plea, such as that which the tenant undertook to present. The denial contemplated by the statute must be express and positive, and not circumstantial, argumentative, nor evasive (*Niblo v. Post*, 25 *Wend.* 280). And where two tenants were jointly charged, in the affidavit of the landlord, with holding over after demand and non-payment of rent, the affidavit of one of them, stating that the rent had not been demanded *of him*, was held insufficient (*Geisler et al. v. Acosta*, 9 *N. Y.* 227).

The denial by a tenant in his affidavit, of each and every allegation contained in the affidavit of the landlord, is sufficient. The affidavit is none the less a denial of the allegations of the landlord, because the allegations are not separately referred to. Where the tenant can not deny all the allegations, he must necessarily describe those which he wishes to deny. A tenant may seldom be able to deny all the allegations of the landlord, but in a case where he can deny all that has been stated by the landlord, the denial is as

complete and well defined by a general denial of every allegation, as if every statement had been recounted and denied in detail (*The People v. Coles*, 42 *Barb.* 96), and all the facts not denied by the counter affidavit are taken as admitted (*McGuire v. Ulrich*, 2 *Abb.* 28; *The People v. Teed*, 48 *Barb.* 424; S. C. 33 *How. Pr.* 238).

It is not competent, however, for a tenant in these proceedings, to show a breach of the landlord's agreement to construct the premises in a proper manner. The tenant can not withhold both the rent and the possession (*People v. Ward* 14 *Abb. Pr.* 372; 38 *Barb.* 269; *Lafarge v. Mansfield*, 31 *Id.* 345).

General form of counter affidavit.

Before Hon.

, Justice.

In the matter of the application

by JOHN DOE, as landlord,

v.

RICHARD ROE, as tenant.

} By tenant.

City and county of New York, ss.

Richard Roe, the person described in the summons herein as tenant being duly sworn makes oath as follows, viz.:

He denies each and every fact alleged in the affidavit of John Doe, upon which this proceeding was instituted.
Sworn, &c.

[Insert the denial according to circumstances. If it be a case in which the tenant can conscientiously make the above form of denial, he may do so. If not, insert such denials as the facts of the case may justify. If there be any affirmative defense, it should be specially pleaded with the same particularity required in ordinary actions in courts of record.]

Counter affidavit by a person (not a party to the proceeding) either in possession or claiming possession of the demised premises.

[*Title of proceeding.*]

City and county of New York, ss.

Paul Jones, being duly sworn, says that he is in the possession of the demises premises, and claims the possession thereof (state according to the fact), and for defense to this proceeding, he denies under oath, each and every fact alleged in the affidavit upon which this proceeding was instituted.

Sworn, &c.

IV.

Amendments in these proceedings.

There seems to be no authority in the statute, to permit amendments to the affidavits, or summons in these proceedings ; and if they prove defective in any material respect the proceeding must be dismissed, provided the tenant in due time point out, by objection thereto, the particular defect complained of. And where a counter affidavit is once filed there seems to be a like want of authority either to permit its amendment or to allow the filing of a supplemental affidavit to supply defects in the one originally filed. It therefore behooves practitioners to be careful in the preparation of their papers, because incurable defects may prejudice, if not defeat, the claim or defense prosecuted or defended.

V.

Demanding trial by jury.

The statute permits any person authorized to prosecute or defend these proceedings, to demand a jury to try the matters in controversy created and raised by the filing of the counter affidavit. But the right to a jury trial is waived, unless at the time designated in the summons for showing cause, a trial by jury be demanded by one of the parties to the issue to be tried, and unless such party shall at the time of such demand, pay to the magistrate, the necessary fees of obtaining such jury (*vide* sec. 34 of the statute as amended in 1857, *ante*, p. 189 ; *The People v. Hovey*, 4 *Lans.* 86). Prior to this amendment in 1857, the magistrate had no authority to try issues raised in these proceedings without a jury (*Benjamin v. Benjamin*, 1 *Seld.* 383), and in order to form the jury under the statute as amended in 1857, the magistrate with whom the counter affidavit is filed

is required to nominate twelve reputable persons qualified to serve as jurors in courts of record; and is required to issue his precept directed to the sheriff, or one of the marshals of the county, or any marshal of the city or town, commanding him to summon the persons so nominated to appear before such magistrate, at such time and place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference (*vide* sec. 35, *ante*, p. 189).

Venire for jury.

The people of the state of New York, to the sheriff of the city and county of New York, or any marshal of the city of New York, greeting:

We command you to summon

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.

good and lawful men of the city and county of New York, qualified to serve as jurors in courts of record, who are in no wise of kin to , the landlord, nor to , the tenant, claiming possession of a certain house and premises, known as No. street, in the city of New York, between whom a controversy exists, to be and appear before me, the justice of the district court of the city of New York, for the first judicial district, at the court house, No. street, in said city, at ten o'clock in the forenoon of that day, to try the matters in difference between the said parties, and have you then and there the names of the jurors, and this precept; the said jurors being nominated by me to serve as jurors in said proceeding.

Given under my hand, the day of 187 .

, Justice.

Officer's return of service of summons on jurors.

New York, 187 . I certify and return that I served the within (or above) named jurors; those marked P. in person, and those marked C. by copy.

, Sheriff.
, Marshal.

Juror's summons.

SIR: You are hereby summoned to attend as a juror, before
 , Esq., the justice of the district court in the city of New
 York, for the first judicial district, at the court house, No.
 street, in said city, on the day of , 187 , at
 ten o'clock in the forenoon. Fine for non-attendance, ten dollars.
 , Sheriff.
 , Marshal.

VI.

Adjournments.

The magistrate is authorized to adjourn the trial of the issues, upon the request of either party, for the purpose of enabling such party to procure his witnesses, whenever it shall appear to be necessary. The adjournment in any case, can not, however, exceed ten days (§ 41 of the statute, *ante*, p. 191), and the proceeding being summary in its character is seldom adjourned longer than from one to three days, according to circumstances. Although it is customary to grant one short adjournment in these proceedings after the joining of issue, there is no law requiring it. In order to make it appear that the adjournment is necessary, an affidavit in the following form may be used.

Affidavit to adjourn trial.

[*Title of proceeding.*]

City and county of New York, ss.

Richard Roë, being duly sworn, says, That he is the person described as tenant herein; that issue has been joined by the filing of a counter affidavit herein, and that deponent is not ready for trial owing to the absence of material testimony, as hereinafter stated. That deponent, has fully and fairly stated the case herein to John Smith, his counsel, who resides in the city of New York, and that deponent has a good and substantial defense to said proceedings, on the merits thereof, as he is advised by said counsel, after such statement, and verily believes that he has stated to his said counsel what he expects and believes he will be able to prove on said trial, by Paul Jones, who is a material and necessary witness for deponent thereon, and that without the testimony of said Jones, deponent cannot safely proceed to the trial thereof, as he, deponent, is advised by his said counsel, and verily believes. That the proceeding is brought

to recover possession of the premises known as No. _____ street, in the city of New York. (*Here state the nature of the proceeding and defense, and show the materiality of the evidence.*) That deponent has made diligent efforts to find said witness, and could not; that on the _____ day of _____, 187____, he procured a subpoena for him, for the purpose of procuring the attendance of said witness at this court, this day, and that said subpoena was not served, for the reason that after a vigilant search and inquiry for said witness, at his residence and place of business, it was ascertained that he had left the city of New York, expecting to return on the _____ day of _____, 187____, at which time, and not sooner, deponent believes he will be able to procure his attendance as such witness herein (or offer such other excuse as the nature of the circumstances afford).

RICHARD ROE.

Sworn to before me, &c. }

[This affidavit should be varied according to circumstances, and the nature and materiality of the evidence should appear, so that the justice may determine whether the witness is really material or not, and to enable the other side to determine whether they will admit what is expected to be proved by the absent witness, and in that way render the adjournment unnecessary.]

CHAPTER XXXI.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS
—*Continued.*—PROCEEDINGS UPON TRIAL.

- I. Trial without a jury—Oath to witnesses.
- II. Trial by jury.
- III. The jury—Qualifications—Drawing—Talesmen—Challenges
—Oath to jurors.
- IV. Evidence upon the trial.
- V. The judge's charge and oath to officer.
- VI. Deliberations of the jury.
- VII. Verdict of the jury—its effect.

I.

Trial without a jury.

The statute provides that if a trial by jury be not demanded, and the necessary costs and expenses of obtaining such jury be not paid at the time designated in the summons for showing cause, that the matters in issue shall be tried and determined by the magistrate alone (*vide* § 34, *ante*, p. 189), and if either party, upon the return of the summons, demand a jury according to the provisions of the act, the person so demanding the same, may, upon the adjourned day, waive the jury, and elect to try the issue raised before the magistrate alone.

The trial is conducted with the same formalities and under the same rules of evidence applicable to ordinary actions.

The oath to the witnesses may be administered in the following form :

Oath to witnesses.

You do swear, that the evidence you shall give in this matter, in difference between John Doe, as landlord, and Richard Roe, as tenant,

will be the truth, the whole truth, and nothing but the truth, so help you God.

II.

Trial by jury.

Trials by jury are conducted in the same manner as trials by the court. The party demanding the jury trial may afterwards waive it, if he choose, by consent in open court, and the magistrate may thereupon proceed with the trial as if no jury had been demanded.

III.

The jury—Qualifications—Drawing—Talesmen—Challenges—Oath to jurors.

The statute, after directing the mode of summoning the jury (*vide* § 35 of the statute, p. 189), provides that twelve jurors are to be summoned, and that six of the persons so summoned *are to be drawn* in the same manner as jurors in justices' courts (*vide* § 36 of the statute, p. 190).

Talesmen.

The statute further provided that whenever a sufficient number of jurors, duly drawn and summoned, do not appear, or can not be obtained to form a jury, the magistrate may order any sheriff or marshal to summon from the bystanders or from the county at large so many persons qualified to serve as jurors as shall be sufficient, and return their names to the magistrate (*Id.* and *Laws* 1862, ch. 368); prior to the act of 1862, the magistrate had no power to summon talesmen to form a jury (*Miner v. Burling*, 32, *Barb.* 540), and if there was a default of jurors on the return of the venire he was consequently put to the necessity of issuing a second venire, and so on until a jury appeared (*Roach*

v. Cosine 9 *Wend.* 227; *Porter v. Cass*, 7 *How.* 441); but this difficulty no longer exists.

Qualifications of jurors.

The section of the statute in regard to jurors (§ 36), it will be seen, gives the magistrate the power to nominate the persons to form a jury—the limitation is twelve—and the persons so nominated must be qualified to serve as jurors in courts of record.

By the statute applicable to the city of New York, no person is allowed to serve as a juror unless he is an intelligent man, of sound mind, and good character, free from legal exception, and able to read and write the English language understandingly. But no person is exempt from serving as a juror by reason of age, unless he is more than seventy years old; nor by reason of non-residence if he has dwelt or lodged in the city or county for the greater part of the time between the 1st day of October and the 30th day of June next thereafter; and to render a person liable to do duty as a juror, it is not necessary that such person shall be assessed or vote in the city (1870, ch. 539). In consideration of certain labors performed for the state, the statutes give to certain persons a right to claim exemption from jury duty. But as this right is a mere personal privilege, and its existence does not disqualify the juror nor form a ground for challenge, it is unnecessary to do more than to allude to it. The general law applicable to the counties in the state which have no special law upon the subject, provides that the persons qualified to do jury duty are, 1. Male inhabitants of the town, not exempt from serving on juries; 2. Of the age of twenty-one years or upwards, and under sixty years old; 3. Who are at the time assessed for personal property belonging to them in their own right, to the value of \$250, or shall have a freehold estate in real property in the county belonging to them in their own right, or in the the right of their wives, to the value of \$150; 4. In the

possession of their natural faculties, and not infirm or decrepit; 5. Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, and well informed (2 *Edm. R. S.* p. 428, § 13); certain exceptions are made in reference to persons residing in either of the counties of Niagara, Erie, Chautauque, Cattaragus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence and Franklin, whereby such residents, who do not possess either of the qualifications specified in the third subdivision of the above section, but who are qualified in other respects, and who shall have been assessed on the last assessment roll of the town for land in his possession which he holds under contract for the purchase thereof, upon which improvements shall have been made to the value of one hundred and fifty dollars, and who shall own such improvements, shall be deemed qualified to serve as jurors (*Id.* § 14).

The act allowing *twelve* jurors to try issues in the district courts by consent, relates only to *actions*, and not to the summary proceedings (1869, chap. 410, p. 932).

Having given the mode of summoning, and the qualifications of the jurors who are to try these proceedings, we next proceed to the manner in which they are to be drawn according to the statute.

Manner of drawing jurors in justices' courts.

Before proceeding to draw the jury in the manner directed hereafter, the justice should call over the constable's list of persons returned served, entering the names of such as do, and such as do not appear and answer. This being done, the manner of drawing the jury is directed by the statute to be as follows (*Cow. Tr.* § 1287):

(§ 99.) At the trial of the cause, the names of the persons so returned, and who shall appear, shall be respectively written on several and distinct pieces of paper, as nearly of one size as may be, and the consta-

ble, in the presence of the justice, shall roll up or fold such pieces of paper, as nearly as may be, in the same manner, and put them together in a box, or some convenient thing (*Cow. Tr.* § 1287).

(§100.) The Justice shall then draw out six (or such number as the parties may have agreed upon) of such papers, one after another, and if any of the persons whose names shall be so drawn shall be challenged * and set aside, then such further number shall be drawn as will make up the number required, after all legal causes of challenge* allowed by the justice. The persons so drawn appearing, and approved as indifferent, shall compose the jury to try the cause (*Cow. Tr.* § 1287).

No peremptory right of challenge in these proceedings.

The act of April 27, 1847, giving a right of peremptory challenge on the trial of issues of fact in civil actions, does not apply to such an issue in summary proceedings, and § 36 of the statute which declares that six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, does not extend the preemptory right of challenge to such cases (*People v. Hamilton*, 39 *N. Y.* 107, affirming 15 *Abb. Pr.* 328), but it is supposed that the right of challenge to the competency or to the favor of the juror still exists.

The jury having been duly summoned, drawn, and empanelled, are next to be sworn; the oath to the jurors may be in the following form:

Oath to jurors.

You do swear that you will well and truly hear, try, and determine the matters in difference between John Doe, as landlord, and Richard Roe, as tenant, and a true verdict render according to the evidence. So help you God.

* No peremptory right of challenge is allowed in summary proceedings.

IV.

Evidence upon the trial.

The rules of evidence applicable to ordinary actions apply in like manner to these proceedings. If the tenant fails to appear upon the return of the summons and proof by affidavit of the due service of the summons is furnished to the magistrate, judgment is entered in favor of the landlord, as of course, without any further evidence. If the tenant or anyone claiming possession appear and contest the landlord's right of possession, the counter affidavit determines the character of the issue, and whatever facts are not denied are by the mere omission to deny them admitted (*People ex rel. McGuire v. Ulrich*, 2 *Abb. Pr.* 28 ; *People v. Teed*, 48 *Barb.* 424 ; S. C. 33 *How. Pr.* 238). In addition to the general rules above referred to, reference is made to a few of the decisions peculiarly applicable to this remedy. Thus, where the facts put in issue are, the ownership of the premises, and the hiring thereof to the tenant, proof of the conveyance to the landlord, and payment of rent to him by the tenant, establishes both these issues against the tenant (*The People v. Teed*, 48 *Barb.* 424 ; S. C. 33 *How. Pr.* 238), and as to the evidence required in cases where land is sold under execution see *Brown v. Betts* (13 *Wend.* 29), *Hallenbeck v. Garner* (20 *Id.* 22), and *Birdsall v. Phillips* (17 *Id.* 463), and although a tenant as a rule is not permitted to dispute his landlord's title (see *ante*, p. 97, 1 *Cai.* 444 ; 2 *Id.* 215 ; 7 *John.* 186 ; 10 *Id.* 358 ; 13 *Id.* 240 ; 5 *Wend.* 246 ; 5 *Den.* 431 ; 38 *Barb.* 269), he may show that such title has terminated, either by its own limitation or by conveyance or by operation of law (*Jackson v. Davis*, 5 *Cow.* 123 ; *Buck v. Binninger*, 3 *Barb.* 391 ; *Capet v. Parker*, 3 *Sandf.* 662 ; *Despard v. Walbridge*, 15 *N.*

Y. 374), and an infant is not estopped by a contract with plaintiff from showing title in himself (*McCoon v. Smith*, 3 *Hill*, 147), but infancy is no defense, the possession after refusing to pay rent being wrongful.

V.

The judge's charge.

Upon the conclusion of the evidence it is customary for the justice to charge the jury, although he is under no obligation to do so.

If, however, specific requests to charge are put, which are pertinent to the issues to be determined, the justice might not be authorized to decline to charge them.

In *The People ex rel. Ward v. Kelsey* (14 *Abb. Pr.* at p. 378), before the New York Supreme Court upon *certiorari*, it appeared that after the evidence before the justice closed, and the questions involved were about to be submitted to the jury, the judge proceeded to charge them upon the law of the case. Whereupon the counsel for the tenants objected, that there was no legal right vested in the magistrate in summary proceedings to charge the jury. Several questions of law arose in the progress of the trial, with which it can not be supposed the jury were conversant, and which it was of some consequence should be rightly comprehended, before they could act intelligibly and sensibly. The defendant insisted that they were not to obtain a knowledge of the law from the judge, and that whatever he said in respect thereto, however just and true, was an error, for which the court should reverse the proceedings, and the Supreme Court, general term in the second district (per BROWN, J.) said: "This is a most extraordinary proposition. There is no express authority and direction contained in the statute concerning summary proceedings to recover the possession of lands (2 *Rev. Stat.* 417), that the judge shall

instruct the jury upon the law. Nor are there any express words authorizing him to swear the witnesses, or to say what is to be received as evidence, and what not; nor even to preserve order and decorum during the trial. Yet no one will think of disputing his authority to do all these things. Without it, the trial could not proceed, and the remedies provided by the act could not be obtained. All these powers, as well as that to instruct the jury, are to be implied. Where the facts upon which the summons was issued are denied by an affidavit, the matters controverted are to be tried by the magistrate or by a jury, provided either party at the proper time demand a jury (§ 34). The matters controverted are those facts upon which the summons was issued and denied by the affidavit of the person in possession of the premises. The legal questions are still, however, to be determined by the judge holding the court or conducting the proceedings. There is to be a trial by a jury. Trial is the examination of the matter of fact in issue. 'Trial by jury, called also trial *per pais*, or by the country, a trial which hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof' (3 *Black Com.* 349). This commentator then proceeds to describe how the jury are to be summoned and selected, how the testimony is to be received, and the witnesses examined, &c., and says, 'when the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and gives them his opinion in matters of law arising upon that evidence.' When our statutes speak of trial by jury, they mean a trial conducted in the manner described by the English commentator. Jurists and lawyers have no conception of

a well conducted trial by jury, in which the charge of the judge upon the law of the case is omitted."

Oath to officer having charge of jury.

You swear in the presence of Almighty God, that you will, to the best of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they shall have been discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed on.

VI.

Deliberations of the jury.

After hearing the proofs and allegations of the parties, the jury are to retire and the above oath should be administered to the officer in charge (*vide* § 37, *ante*, p. 190), but this will be assumed to have been done in the absence of any objection or showing to the contrary (*The People v. Teed*, 48 *Barb.* 424).

The omission or mis-recital of the oath to the officer having charge of the jury, can not be assigned for error, unless it appears that exception to such omission or form was taken at the trial (*Cow. Tr.* § 1316, 3 *Johns.* 430).

The jury should be kept together for such time as the magistrate shall deem reasonable, and if they can not agree, the magistrate may discharge them, and nominate a new jury and issue a new jury in the same manner as in the first instance (*vide* §§ 37, 38, *ante*, p. 190). If the jury do agree, they are to be brought before the magistrate, and are required to announce their verdict in his presence, and the fact that the jury attempted to communicate the verdict to the party in whose favor it was rendered, soon after coming into court, and before the verdict was announced, was held

not to affect the regularity or purity of the verdict (*Fish v. Byrnes*, 14 *Abb.* 12).

Polling the jury.

It is supposed that the jury may be polled, that is, asked individually, "Is that your verdict?" (*Lalor v. Koplin*, 4 *N. Y.* 547). If either answers no, it is supposed that the jury may again retire (2 *Wend.* 352 ; 3 *Johns.* 255).

VII.

Verdict of the jury.

It has been settled by the highest court of authority in this state, that the verdict of a jury in summary proceedings that no rent was due from the tenant to the landlord, was conclusive upon that question, and a bar to any other or further proceeding on the part of landlord for the rent (*White v. Coatsworth*, 6 *N. Y.* 137). In a subsequent case it was held, that where the affidavit of the defendant in summary proceedings to dispossess for the non-payment of rent raises two questions, and the jury finds generally for the defendant, both questions are presumptively *res adjudicata*, and in a subsequent proceeding, in which one of such questions arises, it is for the plaintiff to show it was not passed upon the jury, and that where the defendant's affidavit denied his indebtedness on various grounds, including that of eviction by title paramount, and also denied any demand of the rent, and the jury found a general verdict for the defendant, it was held that the verdict was presumptively *res adjudicata* on both points, and that it was for the plaintiff to show that the jury only passed on the question of demand (*The Yonkers & New York Fire Ins. Co. v. Bishop*, 1 *Daly*, 449).

CHAPTER XXXII.

THE LAW AND PRACTICE ON SUMMARY PROCEEDINGS—
Continued.—FINAL DETERMINATION AND ITS EFFECT.

- I. The adjudication, when and how made—its effect.
- II. Payment of rent after adjudication.
- III. Giving bond to stay warrant in proceeding for non-payment of rent—its form.
- IV. Issuing the warrant—its form and effect.
- V. Redemption in cases wherein the unexpired term exceeds five years.
- VI. Certified copy of adjudication as evidence.

I.

The adjudication, when and how made—its effect.

Section 39 of the statute (*vide ante*, p. 191) provides that if the decision of the magistrate, or the verdict of the jury shall be in favor of the lessor, or landlord, or other person claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff or to any constable of the county in which the premises are situated, commanding such officer to put such landlord, lessor, or other person, into possession, as herein before directed, and section 33 (*vide ante*, p. 188) declares, that if at the time appointed in the summons, no sufficient cause be shown to the contrary, and due proof of the service of such summons shall be made to such magistrate, he shall thereupon issue his warrant to the sheriff of the county, or to any constable or marshal of the city or town where the premises are situated, commanding him to remove all persons from the said premises, and to put the landlord into the full possession thereof. Neither of these sections provide

in words for any judgment, but this is necessarily implied (The People *ex rel.* Ward *v.* Kelsey, at p. 378). The power to hear, try, and determine these proceedings, of necessity vests in the magistrate the necessary authority to declare the result of his determination when made, and this formal determination is called in law a judgment. BOUVIER defines a judgment to be "the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein, for the redress of an injury."

The form of the judgment usually adopted is endorsed upon the papers, as follows:

Form of judgment by default.

Before JUSTICE QUINN.

JOHN DOE	}	Landlord.
v.		
RICHARD ROE.		Tenant.

Summons to show cause the 4th day of November, 187 .

The landlord appeared on the 4th day of November, 1875, and demands the rent, and possession of the premises within mentioned, for the non-payment of the rent. The [tenant fails to appear, and no sufficient cause having been shown to the contrary] judgment is therefore rendered the 4th day of November, 1875, in favor of the said landlord, that he have possession of the premises within described, by reason of the non-payment of the said rent (or by reason of the expiration of the tenant's term, according to the fact), and that a warrant issue to remove the said tenant and all persons from the said premises, and to put the landlord into full possession.

DENNIS QUINN,
Justice, &c.

Warrant issued day of 187 .

[The recitals in the judgment should be stated according to the fact. The filing of the counter affidavit, the adjournments, the demand of a jury trial, the verdict of the jury, all these things should be stated, if true, the design being to make the judgment a sort of *postea* or record.]

Judgments in summary proceedings before justice of the peace.

The statute in reference to summary proceedings before a justice of the peace (*vide* § 51, *ante*, p. 195),

provides that the justice shall enter the finding of the jury, or in case no jury is called, his final decision, upon the application for the warrant on his docket, and render judgment therefor, and include in said judgment costs of such proceedings to the prevailing party, at the same rate of fees now allowed by law in civil actions in courts of justice of the peace, and limited in like manner; and in the warrant for delivery of possession, or by execution issued by him, the justice is required to direct the collection of costs. This section is peculiarly applicable to justices of the peace, and differs essentially from the powers conferred upon the other officers authorized to entertain these proceedings (*vide ante*, § 39, p. 191, § 33, p. 188, and p. 185).

Validity of judgments.

To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null, if the judge had not jurisdiction of the matter; or, having such jurisdiction, he exercised it when there was no court held; or out of his district; or if he rendered a judgment before the cause was prepared for a hearing (*Bouvier's Law Dictionary*, vol. 1, p. 676). Whether these summary proceedings come within these requirements is a matter yet to be determined, although they have always been regarded as a proceeding out of court, and the jurisdiction one peculiar to the magistrate, and not to his court. The judgment must confine itself to the question raised before the court, and can not extend beyond it. For example, where the plaintiff sued for an injury committed on his land by animals owned and kept carelessly by defendant, the judgment may be for damages, but it can not command the defendant for the future to keep his cattle out of the plaintiff's land. That would be to usurp the power of the legis-

lature. A judgment declares the rights which belong to the citizen ; the law alone rules future actions. The law commands all men ; it is the same for all, because it is general ; judgments are particular decisions, which apply only to particular persons, and bind no others ; they vary like the circumstances on which they are founded. Litigious contents present to the court facts to appreciate, agreements to be construed, and points of law to be resolved. The judgment is the result of the full examination of all these. Jurisdiction is that power or authority which the law has conferred upon courts, judges, or justices of the peace over the persons or the property of others, and over the subject-matter of actions or proceedings, to take cognizance of, to hear, try, and determine the rights of the parties in relation thereto ; to render a proper decision or judgment therein, and to carry that decision or judgment into execution. Consent can not confer jurisdiction, unless the court has jurisdiction of the subject-matter ; if it has jurisdiction of the subject-matter, consent will, as a rule, confer jurisdiction on the parties (§ 19, 20, *Cow. Tr.* ; see also 2 *Hill*. 657 ; 2 *E. D. Smith*, 22, 38 ; 9 *N. Y.* 266, 267).

And where the jurisdiction of a court of limited authority depends on a fact which must be ascertained by such court, and such fact appears, and is stated in the record of its proceedings, a party who appeared, and had an opportunity to controvert the jurisdictional fact, and did not, but contested on the merits, can not afterwards, in a collateral action, impeach the record, and show that the jurisdictional fact did not exist (*Dyckman v. The Mayor*, 5 *N. Y.* 434, affg. 7 *Barb.* 498).

Time within which judgment must be rendered.

If the proceeding is to be regarded as one within the peculiar jurisdiction of the magistrate, as a judge out of court, the statute imposes no limitation upon him as to

the time within which he must render his decision, for by such a construction, the statute limiting the time within which ordinary actions in the court of the magistrate must be decided, has reference only to cases before the court, technically so called, as distinguished from those special jurisdictions conferred by statute peculiarly upon the magistrate as an officer out of court.

The effect of such judgments.

The adjudication of the magistrate or the verdict of his jury, is conclusive in all other controversies in which the same issues arise (*White v. Coatsworth*, 6 *N. Y.* 137; *Kelsey v. Ward*, 16 *Abb. Pr.* 98, aff'd 38 *N. Y.* 83; *Yonkers Ins. Co. v. Bishop*, 1 *Daly*, 449), and the courts have even gone as far as to hold, that a judgment even by default in these proceedings was conclusive upon the parties to it in any other action or proceeding (*Powers v. Witty*, 42 *How. Pr.* 352; *S. P. Morris v. Floyd*, 5 *Barb.* 130). Although where in a summary proceeding the defendant's affidavit denied his indebtedness on various grounds including that of eviction by title paramount, and also denied any demand of the rent, and a jury found a general verdict for the defendant, it was held in a subsequent action for the same rent, where this record was offered by the defense, that it was presumptively *res adjudicata*, on both points, and that it was for the plaintiff to show (if such was the fact) that the jury passed only on the question of demand (*Yonkers Ins. Com. v. Bishop*, 1 *Daly*, 449).

II.

Payment of rent after adjudication.

As stated in Chapter XXVI. (*ante*, p. 228), the tenant has the right, in a proceeding for non-payment of rent, even after judgment, to pay the rent claimed, pro-

vided he pays with it the taxable costs and charges, and the legally accrued interest, which is an incident to the rent (*vide ante*, p. 222), at any time before the warrant is actually issued (*vide ante*, § 44, p. 192).

III.

Giving bond to stay warrant in proceeding for non-payment of rent, its form.

The statute contains the following provisions as to staying proceedings upon giving security, viz. :

In case of rent.

§ 44. The issuing of such warrant of removal shall be stayed in the case of a proceeding for the non-payment of rent, if the person owing such rent shall, before such warrant be actually issued, pay the rent due, and all the costs and charges of the proceedings; or give such security as shall be satisfactory to the said magistrate, to the person entitled to such rent, for the payment thereof, and the costs aforesaid, in ten days. And in case the person giving such security shall not within the said ten days produce to the magistrate satisfactory evidence of the payment of the rent and costs, the warrant of removal may at any time thereafter be issued (*vide ante*, p. 192).

Form of bond under above section.

Know all men by these presents, that we, John Jones of street, in the city of New York, and Paul Jones of street in said city, are held and firmly bound unto John Doe of the same place, in the sum of (double the amount of the rent and costs) to be paid to the said John Doe, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the day of 187 .

Whereas, in a certain proceeding pending before Esq., the justice of the district in the city of New York for the first judicial district, by John Doe, landlord, against Richard Roe, tenant, it was on the day of 187 , adjudged that the said Richard

Roe held over and continued in possession of the premises known as No. street, in said city, without permission of his landlord, after a default in the payment of the rent, pursuant to the agreement under which said premises were held, and which said rent, with the costs of said proceeding, now amount to dollars; now, therefore, in order to stay the issuing of the warrant of dispossession in said proceedings, and pursuant to the statute in such a case made and provided, the condition of this obligation is such, that if the said tenant shall pay to the said landlord, John Doe, his executors, administrators, and assigns, the said rent and costs within ten days from the date hereof, then the said obligation shall be void, otherwise to remain in full force and virtue.

JOHN JONES. [L. s.]
PAUL JONES. [L. s.]

In presence of }

An affidavit in the usual form should be annexed, showing the sufficiency of the sureties, and the bond should be properly acknowledged, and should be thereafter endorsed by the magistrate with his approval in the following form:

"The within security is satisfactory to me, and is therefore approved."

Justice, &c.

In case where the tenant has taken the benefit of the insolvent act.

§ 45. When the application to a magistrate is founded on the fact that the tenant or lessee has taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment, the proceedings shall be stayed, if at any time before issuing the warrant for removal, the tenant, or lessee, or his assignee, shall pay the costs of such proceedings as have been had, and give such security to the person entitled to the rent, for the payment thereof, as it shall become due, as shall be satisfactory to the magistrate (*vide ante*, p. 192).

Form of bond under above section.

The form of bond required under the above section is the same substantially as the bond, to stay the warrant in proceedings for non-payment of rent (*supra*), excepting as to the recital of the particular character of the proceeding, which should be stated according to the fact, and excepting also the condition, which may be in the following words:

"Now, therefore, in order to satisfy the requirements of the statute in such case made and provided, the condition of this obliga-

tion is such, that if the said tenant (or lessee, or assignee, according to the fact) shall pay to the said landlord, John Doe, his executors, administrators, or assigns, all rent now due or that may hereafter become due, under and by virtue of the terms of the demise under which the said tenant (lessee or assignee, as the case may be) holds said premises, then this obligation shall be void; otherwise to remain in full force and virtue."

In cases where the premises have been sold under execution.

§ 46. When such application is founded upon an alleged sale, by execution, of the premises occupied by the defendant in such execution, the proceedings shall be stayed, if at any time before issuing the warrant of removal, the occupant shall,

1. Pay the costs of such proceedings.

2. File with the officer before whom the application is pending, an affidavit that he claims the possession of such premises by virtue of some title or right acquired after such premises were sold; or as guardian or trustee for any other; and,

3. Execute a bond to the applicant for such warrant, in such penalty and with such sureties as the magistrate shall approve, conditioned to pay the costs which may be recovered against him in any ejectment that may be brought by such applicant within six months, for the recovery of the possession of such premises; and to pay the value of the use and occupation of such premises, from the date of such bond to the time such applicant shall obtain possession of the same by virtue of a recovery in such action of ejectment; and also conditioned not to commit any waste or injury to such premises, during his occupation thereof (*vide* § 46, p. 193).

Form of bond under above section.

Know all men by these presents, That we, Richard Roe, hereinafter named, John Jones of No. _____ street, in the city of New York, and Paul Jones of _____ street, in said city, are held and firmly bound unto John Doe of the same place, in the sum of _____ (the magistrate is to approve the penalty of the bond) to be paid to the said John Doe, his executors, administrators, or assigns, for which payment, well and

truly to be made, we bind ourselves, our heirs, our executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the day of 187 .

Whereas, in certain proceedings commenced before Esq., the justice of the district court, in the city of New York, for the judicial district, by John Doe, against Richard Roe, to recover the possession of certain real estate to wit, the premises known as No. street in the city of New York, sold on execution against said Richard Roe, and whereas said Richard Roe claims the legal title in and to the said premises, and has filed an affidavit of such claim with said justice, now, therefore, the condition of the above obligation is such, that if the said obligors pay all the costs which may be recovered against the said Richard Roe, in any ejectment that may be brought by said John Doe, within six months, for the recovery of the possession of such premises, and also pay to the said John Doe, the value of the use and occupation of said premises from the date hereof, to the time said John Doe shall obtain possession of the same by virtue of a recovery in said action of ejectment, and conditioned also that the said Richard Roe do not commit any waste or injury to said premises during his occupation thereof, then this obligation to be void, otherwise to remain in full force and virtue.

RICHARD ROE.	[L. s.]
JOHN JONES.	[L. s.]
PAUL JONES.	[L. s.]

In presence of }

[The sureties are to justify, and the bond is to be acknowledged and approved in like manner as upon the bond to stay the issuing of the warrant in case of non-payment of rent] (*vide ante*, p. 289).

Affidavit of claim in last case.

State of New York, city and county of New York, ss.

Richard Roe, being duly sworn says, that after the sale of the premises described in the affidavit of John Doe [*here state the facts showing the right in the affiant to the possession of the premises by virtue of some title or right acquired after such premises were sold by the sheriff or as guardian or trustee for any other, and then continue*], and that by means of the premises said John Doe has no interest, claim or title, in or to said premises, that deponent has paid the costs of these proceedings and has executed a bond with sureties to be approved by the magistrate who issued the summons, and which said bond deponent tenders to the said John Doe, the person prosecuting said proceedings.

RICHARD ROE.

Sworn to, before me this	}
day of 187 .	}

IV.

Issuing the warrant, its form and effect.

The statute (§ 43, *vide* p. 192) provides that "when- ever a warrant shall be issued by any such magistrate for the removal of any tenant from any demised prem- ises, the contract or agreement for the use of the prem- ises, if any such exists, and the relation of landlord and tenant between the parties, shall be deemed to be can- celled and annulled ;" and after the adjudication, the magistrate is bound to issue his warrant as required by the statute (§ 39, *ante*, p. 191), and may be compelled to do so by mandamus (*People v. Willis*, 5 *Abb. Pr.* 205), unless the proceeding be for non-payment of rent and the statutory stay of ten days be procured by the execution of a bond to pay the rent within that time, as provided and allowed by § 44 (*ante*, p. 192), and if such bond be given, and the person giving it does not, within the ten days, produce to the magistrate satisfac- tory evidence of the payment of the rent and costs, the warrant of removal may at any time thereafter be is- sued (*Id.*), but the provisions of the statute in regard to staying the warrant upon the execution of a bond, have no application to proceedings for holding over, and ap- ply only to those for non-payment of rent (*Sage v. Harpening*, 49 *Barb.* 166).

The form of the warrant.

1. For non-payment of rent.
2. For holding over.
3. In other cases.

1. *For non-payment of rent.*

To the sheriff of the city and county of New York, or to any marshal of said city, greeting :

Whereas, John Doe hath made oath in writing, and presented the

same to me, that he is the landlord of the premises hereinafter described, and that Richard Roe, as tenant, was justly indebted to the said landlord in the sum of fifty dollars, for one month's rent of the premises known as No. 1 Broadway, in the city of New York, in advance, from October 1st, 1875, till November 1st, 1875, that the said rent has been demanded from the said tenant since the same became due, and the said tenant has made default in the payment thereof, pursuant to the agreement under which the premises are held, and that the said Richard Roe, as such tenant, holds over and continues in possession of the same, without the permission of the landlord, after default in the payment of the rent as aforesaid. Whereupon I issued a summons, requiring the tenant, and each and every person in possession of the said premises, or claiming the possession thereof, forthwith to remove from the said premises, or show cause before me, at a certain time now past, why the possession of the said premises should not be delivered to the said landlord; and no good cause having been shown, or in any way appearing to the contrary, and due proof of the service of such summons having been made to me, Therefore, in the name of the people of the state of New York, you are commanded to remove all persons from said premises, and put the said landlord into the full possession thereof.

In witness thereof, I have subscribed these presents, this 4th day of November, in the year 1875.

DENIS QUINN,
Justice of the District Court in the city of New York,
for the first Judicial District.

2. For holding over.

To the sheriff of the city and county of New York, or to any marshal of said city, greeting:

Whereas, John Doe has made oath in writing, and presented the same to me, that he is the landlord of the premises hereinafter described, and on or about the 1st day of October, 1875, he rented unto Richard Roe as tenant, the premises known as No. 1 Broadway, in the city of New York, for the term of one month from the 1st day of October, 1875, which said term has expired, and that said tenant holds over or continues in possession of the same after the expiration of his term therein, without the permission of the landlord: Whereupon I issued a summons requiring the said tenant forthwith to remove from the said premises, or show cause before me, at a certain time now past, why the possession of the said premises should not be delivered to the landlord; and no sufficient cause having been shown to the contrary, and I, being satisfied by due proof of the service of the said summons, Do, therefore, in the name of the people of the state of New York, command you to remove all persons from the said premises, and put the landlord into the full possession thereof.

In witness thereof, I have subscribed these presents, this 2d day of November, in the year 1875.

DENIS QUINN,
Justice of the District Court in the city of New York,
for the first Judicial District.

3. *In other cases.*

The direction and command in the warrant are the same in all cases, but the recitals in the warrant should follow those in the affidavit, and if a trial be had that fact may be stated. With the affidavit and summons in the proceeding present, there can be but little difficulty in inserting the necessary recitals.

Sheriff's, constable's, or marshal's return upon warrant.

Pursuant to the command of the above warrant, I have this day put the landlord into the full possession of the premises therein mentioned. Dated this day of 187 .

, Sheriff.
 , Marshal.
 , Constable.

The effect of the warrant.

The effect of the warrant is declared in § 43 of the act (*ante*, p. 192); it cancels and annuls the lease and extinguishes the relation of landlord and tenant, but only from the time of the default (*Hinsdale v. White*, 6 *Hill*, 507); all rent prior to the default may be recovered (*Johnson v. Oppenheim*, 55 *N. Y.* 280; 4 *E. D. S.* 339; 2 *Hill*. 217; 1 *Duer*, 266; 3 *Den.* 452; 12 *Abb. N. S.* 6). The remedy after default is not on the lease, but against the tenant wrongfully holding over, as a wrong-doer (*Hinsdale v. White*, 6 *Hill*, 507; *Davison v. Donadi*, 2 *E. D. Smith*, 121; *Hackett v. Richards*, 3 *Id.* 21; *Crane v. Hardman*, 4 *Id.* 339; *Featherstonhaugh v. Bradshaw*, 1 *Wend.* 134; see also 1 *E. D. S.* at p. 419; 3 *Den.* 456; 2 *N. Y.* 336; 30 *Barb.* 386; 5 *Robt.* 180; 23 *How.* 239; 1 *Duer*, 276; 1 *Daly*, 46), and rent payable in advance, is not affected by an eviction occurring subsequent to the day it is payable (*Giles v. Comstock*, 4 *N. Y.* 270; *Johnson v. Oppenheim*, 55 *N. Y.* 280). The effect of a re-entry for condition broken upon a lease reserving such right, and agreeing to pay any deficiency thereafter was considered in *Hall v. Gould* (13 *N. Y.* 127).

Protection of the warrant.

A warrant of dispossession properly issued, protects all who act under it without regard to the state of the

weather, unless they act wilfully and maliciously (*Higgenbotham v. Lowenbein*, 28 *How.* 221 ; S. C. 3 *Rob.* 22), and where the landlord and owner in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands, and attempt to dislodge the former by force. The landlord, being in actual possession, has a right to maintain it, and to use force for that purpose, if necessary (*Sage v. Harpending*, 49 *Barb.* 166 ; S. C. 34 ; *How. Pr.* 1), and where a dispossessing warrant has been issued in summary proceedings against a tenant, and is regular and valid, and the landlord has been put into possession of the premises by virtue of it, he is justified in using so much force as is necessary to defend himself, and maintain his possession ; and is liable in damages to the tenant, in an action for alleged assault and battery in repelling the attempt of the tenant to re-enter, only for excess of force used (*Id.*).

Right to remove persons not named in warrant.

In Connecticut it was held that an execution issued upon a judgment in summary process, commanding the officer to put the defendant *and all others* out of the possession of the premises, is irregular, and will not protect the officer if he dispossess any other than the defendant (*Colt v. Eves*, 12 *Conn.* 259, 261).

Constables and marshals.

The office of constable in the city of New York was abolished in 1862, and the office of marshal created in its place, with the like powers and duty (1862, ch. 484, § 18).

Costs of dispossessing.

In the city of New York, a lessor who has dispossessed the lessee may recover by action the expenses of the proceedings (*Crane v. Hardman*, 4 *E. D. S.* 339).

V.

Redemption in cases wherein the unexpired term exceeds five years.

In case of proceedings for non-payment of rent, if the unexpired term of the lease under which the premises are held exceeds five years at the time of issuing the warrant upon such proceedings, the lessee, his assigns, or personal representatives, may at any time within one year after possession of the demised premises shall have been delivered to the landlord, pay or tender to the lessor, his representatives or attorney, or to the officer who issued the warrant, all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlord—and in such case the premises shall be restored to the lessee, who shall hold and enjoy the same without any new lease thereof according to the terms of the original demise; and any mortgagee of the lease, or of any part thereof, who shall not be in possession of the demised premises, or any judgment creditor of the lessee who shall within one year after the execution of such warrant, pay all rent in arrear, all costs and charges as aforesaid, and perform all the agreements which ought to be performed by the first lessee, shall not be affected by such recovery; and such judgment creditor may file a suggestion of such payment upon the record, and may issue execution for the amount of the original judgment and of such payment (*vide* § 54, *ante*, p. 196).

There seems to be no adjudication of cases under this section, but the right to redeem is absolute in the cases mentioned in the statute, and the landlord and all others claiming under him, must yield possession to the tenant or mortgagee upon the redemption being perfected according to these provisions.

The landlord is bound to accept the tender which

the tenant or mortgagee is authorized by the statute to make, and his refusal to do so may operate to discharge his right of the possession, or lien for the rent, as in the case of a mortgagee (*Kortright v. Cady*, 21 *N. Y.* 343).

IV.

Certified copy of adjudication as evidence.

The act in reference to District Courts in the city of New York, provides that "a transcript of *any* proceedings had before either of said justices, or of any other paper filed with him, or of the minutes of any testimony, taken by or before him, certified by him to be correct, shall be presumptive evidence of the facts therein contained (1857, chap. 344, p. 728, § 78); and in the absence of some statute making a certified copy or transcript evidence, it is supposed that the original record must be produced in connection with other evidence showing its authenticity.

Effect of tenant's death.

It was held in *Hughes v. Sebre* (2 *A. K. Marsh.* 227) that where a tenant died intestate the landlord could not distrain *before* administration, and in *Hovey v. Smith* (1 *Barb.* at p. 377) it was held that the converse of the rule held good; viz., that the landlord could distrain *after* administration.

CHAPTER XXXIII.

INJUNCTIONS TO ENJOIN SUMMARY PROCEEDINGS—IN
WHAT CASES GRANTED.

Section 47 of the statute giving certiorari to review summary proceedings to obtain possession of land, and declaring that such proceedings can not be stayed by order of any court or officer, is effective in all cases where the act gives the tenant an adequate remedy, *i. e.*, where his defense is of a legal character, which can, if true, be effectually established before the magistrate (*High on Injunctions*, § 46; *Kerr's Injunctions in Equity*, p. 15; *Smith v. Moffat*, 1 *Barb.* 65; *Wordsworth v. Lyon*, 5 *How. Pr.* 463; *Hyatt v. Burr*, 8 *Id.* 168; *Duigan v. Hogan*, 1 *Bosw.* 645; S. C. 16 *How. Pr.* 164; *Bokee v. Hamersley*, *Id.* 461; *McIntyre v. Hernandez*, 7 *Abb. Pr. N. S.* 214; *Seeback v. McDonald*, 11 *Abb. Pr.* 95; S. C. 21 *How. Pr.* 224; *Marks v. Wilson*, 11 *Abb. Pr.* 87; *Ward v. Kelsey*, 14 *Id.* 106; *McGune v. Palmer*, 5 *Robertson*, 607; *Rapp v. Williams*, 4 *T. & C. Rept's N. Y. Supreme Ct.* 174). Nor can an injunction issue, because of a counterclaim against the rent on which the tenant may recover in an action at law, the landlord being solvent (*Brown v. The Metropolitan Gas Light Company*, 38 *How. Pr.* 133). And the exceptions to this general rule exist only (1) where the peculiar character of the defense is of an equitable nature, so that the justice by reason of his limited powers can not administer the adequate relief demanded by the equities and exigencies of the case (*Valloton v. Seignett*, 2 *Abb. Pr.* 121; 7 *Abb. N. S.* 214); or where (2) there was fraud in the proceedings, as in the cases of *Griffith v. Brown* (3 *Robt.* 627; S. C. 28 *How. Pr.* 4);

Cure v. Crawford (5 *How. Pr.* 293), in which it appeared that the tenant had not time to arrive at the court room before the hearing after the service of the summons; (3) or in a case of surprise such as *Forrester v. Wilson* (1 *Duer*, 624), in which the court continued an injunction upon the immediate payment of the rent; or in case (4) of fraud or collusion in the proceedings generally (*Bokee v. Hamersley*, 16 *How. Pr.* 461). In the case just cited, the New York Supreme Court hold that the only cases in which the court will interfere by injunction to stay summary proceedings, between landlord and tenant, are:

1. Where there has been fraud or collusion.
2. Where the justice has not obtained jurisdiction; and,
3. Where the tenant, from the peculiar circumstances of the case, is precluded from setting up his defense before the justice.

The Superior Court, however, deny the existence of this second ground, deciding that where the justice has no jurisdiction the remedy is by prohibition (*Bean v. Pettingil*, 7 *Robt.* 7, affg. 2 *Abb. Pr. N. S.* 58).

In *Huggins v. King* (3 *Barb.* at p. 619), Judge HARRIS says: "Among the grounds of equitable jurisdiction enumerated by the elementary writers, is relief against frauds in verdicts, judgments, decrees, and other judicial proceedings (citing 1 *Story's Eq.* § 252; *Fonbl. Eq. B.* 1, ch. 1, § 3, note f). To induce a Court of Equity to grant relief against a judgment, it must appear that the party seeking relief was prevented from availing himself of his defense against the judgment by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part (citing *Foster v. Wood*, 6 *Johns Ch.* 87; *Vilas v. Jones*, 1 *Comstock*, 281). The plaintiff had a good defense to the action in which the judgment was recovered against him. He was prevented from setting up that defense by a gross fraud practiced upon him

by the defendants. Here was no negligence or fault on his part. Under these circumstances, assuming the bill to be true, as the demurrer does, it is a proper case for counteracting the judgment obtained by the defendant's fraud, by the interposition of the equitable jurisdiction of the court."

It is difficult to define the exact nature of the fraud which entitles a plaintiff to an injunction, perhaps, because the manifestations of fraud are so various that it is impossible to embrace its varieties of form within the limits of a precise definition (*High on Injunctions*, § 24, p. 18). The right to an injunction in an action for specific performance was sustained in *Capet v. Parker* (3 *Sandf.* 662), in which form of action the tenants had filed a bill against their landlord, praying, among other things, for an injunction enjoining the landlord from prosecuting summary proceedings to remove the tenants from the premises, which the tenants claimed the landlord had previously contracted to convey to them, and the right to the injunction was claimed until their right to specific performance had been decided. The landlord and his counsel questioned the right of the court to grant the injunction, and disregarded it, and proceeded with the summary proceedings to judgment and warrant. The court held that it had power, and committed the landlord for contempt, unless he consented to vacate all proceedings to dispossess and paid the tenant's costs, and the court in criticising upon the conduct of the landlord's counsel, said: "It was very different from what should have been pursued. He was an officer of the court. He ought, therefore, to have advised his client to respect its authority, even though in his opinion the court had erred. We live under a government of law, and it is one of the peculiar felicities of our condition, that the moral sense of the community is so strongly on the side of obedience to law, that, in the civil administration of justice, resort to

physical force is seldom necessary to carry the judgments of the courts into effect. They are submitted to as a matter of course. It is peculiarly the duty of those who profess the law, to cherish this feeling, and to elevate and strengthen the spirit of obedience to judicial authority. And it is a matter of deep regret, when any of those whose province it is to aid in the administration of justice, encourage resistance to or disregard of the decisions of the court or of its judges," (see also 9 *N. Y.* at p. 266).

In another case, it was held that a tenant suing his landlord, to compel the execution of a renewed lease, if he shows himself equitably entitled to the renewal, may have an injunction *pendente lite*, restraining the landlord from removing him by summary proceedings (*Graham v. James*, 7 *Robt.* 468), but an injunction should not be granted to one not a party to the summary proceedings merely upon an allegation that he is likely to be disturbed in his rightful possession (*Aaron v. Baum*, 7 *Robt.* 340; and see *Marry v. James*, 2 *Daly*, 437), and the fact that the magistrate is a witness is not ground for an injunction, except in an extreme case (*Marry v. James*, *supra*), and the injunction may in a proper case be granted after the warrant has been issued (*Forrester v. Wilson*, 1 *Duer*, 624; *Griffith v. Brown*, 3 *Robt.* 627; S. C. 28 *How. Pr.* 4), but not after its execution (*Roberts v. Mathews*, 18 *Abb. Pr.* 199).

CHAPTER XXXIV.

BAWDY HOUSES AND ILLEGAL TRADES.

- I. The statute relating to bawdy houses.
- II. The statute relating to illegal trades and manufactures.
- III. Proceedings thereunder.
- IV. The forms required in such proceedings.

I.

Bawdy-house act.

Chapter 764.

An Act to amend title ten of chapter eight of part three of Revised Statutes relative to bawdy houses.

Passed May 9, 1868: three-fifths being present.

The people of the state of New York, represented in senate and assembly, do enact as follows:

Section 1. Title ten of chapter eight of part three of the Revised Statutes is amended by adding thereto the following sections:

[The preceding sections, 1 to 23, compose Chapter XX., *ante*, p. 174; §§ 24 to 54 compose Chapter XXI., *ante*, p. 182.]

Application for warrants of dispossession when houses are occupied as bawdy houses.

§ 55. When any house or other real property is used or occupied as a bawdy house, or house of assignation for lewd persons, the owner or landlord thereof may apply to any officer mentioned in section twenty-eight of this title, for a warrant of dispossession, as hereinafter set forth.

Vide § 28 above referred to, *ante*, p. 184.

Application, what to state, and to be verified.

§ 56. Such application shall be made upon an affidavit setting forth that the house or premises in question, or some part thereof, is used or occupied as a bawdy house or house of assignation for lewd persons, describing the premises, and naming, if it can be done, the persons occupying the same, or some one of them.

Magistrate to issue summons to occupants to remove or show cause.

§ 57. Upon such application, accompanied by such affidavit, the magistrate shall issue a summons describing the premises, and requiring the persons named, or described in the affidavit, to remove therefrom forthwith, or show cause before him why they should not do so, in the same time and manner as is prescribed by this article in case of non-payment of rent.

Summons, how served. Warrant commanding removal of occupants, when to issue.

§ 58. The summons shall be served in the manner prescribed by section thirty-two of this title, and if, at the return day, no cause be shown to the contrary, the magistrate shall, upon due proof of service of the summons, issue his warrant to the proper officer, commanding him to remove from the premises aforesaid the persons on whom the summons was served.

Vide § 32, above referred to, *ante*, p. 187.

Occupants may appear and be tried by a jury. Warrant, &c.

§ 59. The person on whom the summons was served, or any other person in possession of the premises aforesaid, may appear and show cause against the application in the manner prescribed by section thirty-four of this title; such proceedings shall thereupon be had as are prescribed by sections thirty-four, thirty-five, thirty-

six, thirty-seven, thirty-eight, forty-one and forty-two ; and if the decision of the magistrate, or the verdict of the jury, be in favor of the complainant, the magistrate shall issue the warrant mentioned in the last section.

Vide §§ 34 to 42, above referred to, *ante*, pp. 189, 190, 191.

Issue of warrant to annul contracts.

§ 60. A warrant issued under either of the last two sections, shall have the effect prescribed by section forty-three of this title.

Vide § 43, above referred to, *ante*, p. 192.

Persons residing in neighborhood of bawdy houses may make application in case the owner or landlord fails to do so.

§ 61. Any owner or tenant of real property in the immediate neighborhood of other real property, used or occupied as a bawdy house, or house of assignation for lewd persons, may give written notice to the owner or landlord of the property so used, to make the application hereinbefore mentioned ; and if such owner or landlord do not, within five days after personal service of such notice upon him or his agent, make such application, or if, having made it, he do not, in good faith, prosecute the same, the owner or tenant giving such notice, may apply to any officer, mentioned in section twenty-eight of this title, for a warrant of dispossession, as is hereinafter described.

Vide § 28, above referred to, *ante*, p. 184.

Proceedings of case of such applications.

§ 62. Such application shall be accompanied by an affidavit similar to that required by section fifty-five, and further setting forth the facts necessary to bring the case within provisions of the last section, and thereupon the officer to whom the application is made shall issue a summons describing the premises, and requiring

the defendant to show cause before such officer in the same time and manner as is prescribed by this article in case of non-payment of rent, why he should not be compelled to remove from such property.

Vide § 55, above referred to, *ante*, p. 303.

**Service of summons upon owners or occupants of bawdy houses.
Warrant, &c.**

§ 63. Such summons shall be served in the manner prescribed by section thirty-two of this title, on the owner or landlord, or his or their duly authorized agent, and also on the tenant, if any, occupying the premises as a bawdy house, or house of assignation for lewd persons; and if, at the return day, no cause be shown to the contrary, the magistrate shall, upon due proof of service of the summons, issue his warrant to the proper officer, commanding him to remove from the premises the persons on whom the summons was served, within two days from the issue of such warrant.

Vide § 32, above referred to, *ante*, p. 187.

**Owners of houses as well as occupants may demand jury trial.
Warrant, &c.**

§ 64. The owner or landlord of the premises, and also any tenant occupying the same, may appear and show cause against the application in the manner prescribed by sections thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, forty-one and forty-two; and if the decision of the magistrate, or the verdict of the jury, be in favor of the complainant, the magistrate shall issue a warrant requiring the defendant to be removed, as is mentioned in the last section.

Vide §§ 34 to 42, above referred to, *ante*, pp. 189, 190, 191.

Act, what to affect.

This act shall affect only lettings or leases hereafter made. [§ 2 of the Act.]

Certain leases, when void.

Whenever the lessee of any dwelling house shall be convicted of a misdemeanor in keeping the same as a bawdy house, the lease or agreement for the letting of such house, shall thereupon become void; and the landlord may enter upon the premises so let, and shall have the same remedies to recover possession thereof as are given by law in case of a tenant holding over after the expiration of his lease (2 *Edm. R. S.* p. 725, § 29).

Keeping a bawdy house was indictable at common law, and the accused have a right to a trial by jury. Hence the statute authorizing them to be proceeded against criminally as disorderly persons is unconstitutional (*Warren v. People*, 3 *Park Cr. R.* 544).

A house kept as a house of ill-fame, and a resort for thieves and other disreputable persons, is a public and common nuisance (*Ely v. Supervisors*, 36 *N. Y.* 297). The principle of the rule that the owner of a house who rents it to be used and kept as a house of prostitution is to be deemed to keep such house, and is liable to indictment and conviction as the keeper of a bawdy house; applies to any person who is personally concerned in the keeping of such a house, *e. g.*, an agent who knowingly lets his principal's property for such use (*Lowenstein v. The People*, 54 *Barb.* 299).

II.

The statute relating to illegal trades

Chapter 583.

An act to define some of the rights and responsibilities of landlords and tenants.

Passed May 22, 1873.

The people of the state of New York, represented in senate and assembly, do enact as follows :

When tenant uses building to carry on illegal business, lease to become void.

§ 1. Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture, or other business, the lease or agreement for the letting or occupancy of such building or premises shall thereupon become void, and the landlord of such lessee or occupant may enter upon

the premises so let or occupied, and shall have the same remedies to recover possession thereof as are given by law in case of a tenant holding over after the expiration of his lease.

Vide proceedings for holding over, *ante*, § 28, p. 184 and p. 230.

Liability of owner leasing building for illegal business.

§ 2. The owner or owners of any building or premises knowingly leasing or giving possession of the same, to be used or occupied, in whole or in part, for any illegal trade, manufacture or business, or knowingly permitting the same to be used for any illegal trade, manufacture, or business, shall be jointly and severally liable with the tenant or tenants, occupant or occupants, for any damage that may result by reason of such illegal use, occupancy, trade, manufacture, or business.

§ 3. This act shall take effect immediately.

Where there is an express covenant against using a house for immoral purposes, yet if the lessor permits a breach of the covenant, and derives gain from it, he can not afterwards recover upon his covenant (*Smith v. White*, 35 *L. J. Ch.* 454; 5 *Bing. N. C.* 666).

III.

Proceedings under said statutes.

The proceedings under these statutes, with the exception of the forms, are substantially like those in the ordinary summary proceedings, which have been fully explained in preceding chapters.

As to bawdy houses.

If the owner, landlord, or agent of the bawdy house, neglect to bring and in good faith prosecute the proceedings authorized by the act, after being requested so to do, any stranger being the owner or occupant of

other real property in the neighborhood may under § 61 of the act commence and prosecute the said proceedings in his own name, without the consent and even against the will of the owner or landlord of the premises complained against.

In this respect, the proceedings under this act essentially differ from those under any of the other summary remedies.

As to illegal trades, manufactures, or businesses.

It is supposed that the trades, manufactures, or businesses contemplated by the act, are those which are forbidden by the statute or local law, or which are not recognized as legitimate and legal at the common law, or which, in their character, are *per se* nuisances at common law, and hence illegal.

IV.

The forms used in said proceedings—arranged as follows :

1. Affidavit upon complaint of landlord under bawdy-house act.
2. Summons to be issued upon said affidavit.
3. Affidavit upon complaint of owner or tenant of neighboring property.
4. Summons to be issued upon last-mentioned affidavit.
5. Affidavit upon complaint of landlord under the act relating to unlawful trades.
6. Summons to be issued upon said affidavit.
7. Endorsement on copy summons.
8. Forms of judgment.
9. Forms of warrant.

1. Affidavit upon complaint of landlord under bawdy-house act.

To Hon. Denis Quinn, Justice of the District Court in the city of New York, for the first Judicial District.

The subscriber applies for a warrant of removal against Richard Roe, the tenant and occupant of the premises hereinafter described, on the grounds of complaint in the accompanying affidavit set forth.

JOHN DOE.

New York, November 1st, 1875.

State of New York, city and county of New York, ss.

John Doe, being duly sworn, says that he is the landlord of the premises hereinafter mentioned. That on or about the 1st day of September, 1875, deponent entered into an agreement with Richard Roe as tenant, by the terms of which agreement the said tenant hired from deponent, as landlord, the dwelling-house situated and known as No. street, in the city of New York, for the term of one year, from September 1st, 1875, at an agreed rental. That the said tenant entered into the occupation of said premises, and is now in possession and occupation of the same. That said premises are now used and occupied by the said tenant (and by other persons connected with him therein, whose names deponent can not ascertain) as a bawdy house and house of assignation for lewd persons for purposes of prostitution, and as a place of resort for such persons for similar purposes, contrary to the statute of the state of New York, in such case made and provided, and that said tenant continues in the possession of the same, and uses and occupies said premises as such bawdy house and house of assignation, in violation of law, and without the permission of the landlord.

JOHN DOE.

Sworn before me, this 1st day of }
November, 1875. }

JOHN SMITH,
Notary Public, N. Y. Co.

2. Summons upon landlord's application under bawdy house act.

To Richard Roe, tenant, and each and every person in possession of the demised premises] hereinafter mentioned, or claiming the possession thereof:

Whereas, John Doe has made oath in writing, and presented the same to me, that he is the landlord of the premises hereinafter described, and that he, the said landlord, entered into an agreement with you as tenant, on or about the 1st day of September, 1875, by the terms of which said agreement, you hired from him, as landlord, the dwelling situated and known as No. street, in the city of New York, for the term of one year from September 1st, 1875, at an agreed rental. That you, said tenant, entered into the occupation and possession of said premises under said hiring, and that you now use and occupy the same (in connection with persons whose names are not known to said landlord) as a bawdy house, and house of assignation for lewd persons, and for purposes of prostitution, and as a resort for such persons, contrary to the laws of the state of New York, and that you continue to use said premises as such bawdy house and house of assignation, in violation of law, without the permission of the landlord.

Therefore, in the name of the people of the state of New York, you, and each of you, are hereby summoned and required forthwith to remove from the said premises, or show cause before me at the court house, on the southwest corner of Chambers and Centre streets, in the city of New York, on the 4th day of November, 1875, at ten o'clock in the forenoon, why the possession of the said premises should not be delivered to the said landlord.

Witness my hand at the city of New York, this 1st day of November, 1875.

DENIS QUINN,
Justice of the district court of the city of New York,
for the first Judicial District.

3. Affidavit upon complaint of owner or tenant of neighboring property.

Insert application as in Form No. 1, *ante*, p. 309, and then proceed as follows:

State of New York, city and county of New York, ss.

John Doe, being duly sworn says, that he is the owner (or tenant, as the fact may be), of the real property known as No. _____ street, in the city of New York, in the immediate neighborhood of the other real property known as No. _____ street, in said city, which said last mentioned real property is used and occupied by Richard Roe as a bawdy house, and house of assignation for lewd persons, for purposes of prostitution, and a place of resort for such persons, and has been so used and occupied for some time past, and that while the said house was so used and occupied, to wit, on the _____ day of _____ 187____, this deponent caused a notice to be personally served upon the owner (or landlord, or their agent, as the case may be) of the said last mentioned property, informing him (or them) of the character of the occupation of said house, and requiring such owner (landlord or agent, as the case may be) to make application under the statute relative to bawdy houses, to remove said Richard Roe from said premises for the cause aforesaid, and that the said parties, each and all of them, have neglected to make the application aforesaid, and have not in good faith or otherwise prosecuted the same, although more than five days have elapsed since the personal service of said notice aforesaid, and this deponent therefore avails himself of the right given by said statute to any owner or tenant of real property, in the immediate neighborhood of the property complained of, to prosecute in case of such neglect aforesaid.

JOHN DOE.

Sworn before me, this _____ day of _____ }
187____.

JOHN SMITH,
Notary Public N. Y. Co.

4. Summons to be issued on last mentioned affidavit.

To Richard Roe, and each and every person in possession of the premises hereinafter mentioned, or claiming the possession thereof.

Whereas John Doe has made oath in writing and presented the same to me, that he is the owner (or tenant as the fact may be) of the real property known as No. _____ street, in the city of New York, in the immediate neighborhood of the other real property, known as No. _____ street in the said city, which last mentioned real property is used and occupied by you, Richard Roe, as a bawdy house and house of assignation for lewd persons, for purposes of prostitution, and a place of resort for such persons, and has been so used and occupied for some time past, and that while the said house was so used

and occupied, to wit, on the day of the , 187 , the said John Doe caused a notice to be personally served upon the owner (or landlord, or their agent, as the case may be) of the said last mentioned property, informing him (or them) of the character of the occupation of said house, and requiring such owner (landlord, or agent as the case may be) to make application, under the statute relative to hawdy houses, to remove you, the said Richard Roe, from the said premises for the cause aforesaid, and that the said parties each and all of them, have neglected to make the application aforesaid, and have not in good faith or otherwise prosecuted the same, although more than five days have elapsed since the personal service of said notice aforesaid, and that said John Doe therefore availed himself of the right given by said statute to any owner or tenant of real property in the immediate neighborhood of the property complained of, to prosecute in case of such neglect aforesaid.

Therefore, in the name of the people of the state of New York, you and each of you are hereby summoned and required forthwith to remove from the said premises, or show cause before me, at the court house, at the southwest corner of Chambers and Centre streets, in the city of New York, on the day of 187 , at ten o'clock in the forenoon, why possession of the said premises should not be delivered to the landlord.

Witness my hand the day of 187 .

DENIS QUINN,

Justice of the District Court of the city of New York,
for the First Judicial District.

5. Affidavit upon complaint of landlord under the act relating to unlawful trades.

Insert application as in Form No. 1, *ante*, p. 309, and then proceed as follows :

State of New York, city and county of New York, ss.

John Doe, being duly sworn, says that he is the landlord of the premises hereinafter mentioned; that on or about the day of

187 , deponent entered into an agreement with Richard Roe as tenant, by the terms of which agreement the said tenant hired from deponent as landlord, the dwelling-house situated and known as No. street, in the city of New York, for the term of

years, from the day of 187 , at an agreed rental. That the said tenant entered into the occupation of said premises, and is now in possession and occupation of the same. That the said premises are now used and occupied by the said tenant for an illegal trade ("manufacture or other business," state the facts fully, so that it may appear to the judicial mind as matter of law that the trade, manufacture, or other business is really illegal), contrary to the statute in such case made and provided, and that the said tenant continues in such illegal use and occupation of said premises, without the permission of this deponent, and in violation of said statute.

JOHN DOE.

Sworn to before me, this }
day of 187 }

JOHN SMITH,
Notary Public N. Y. Co.

6. Summons under the statute as to illegal trades, &c.

To Richard Roe, tenant, and each and every person in possession of the demised premises hereinafter mentioned, or claiming the possession thereof:

Whereas, John Doe has made oath in writing, and presented the same to me, that he is the landlord of the premises hereinafter described, and that he, the said landlord, entered into an agreement with you as tenant, on or about the day of 187, by the terms of which said agreement, you hired from him as landlord, the dwelling situated and known as No. street, in the city of New York, for the term of years from the day of 187, at an agreed rental. That you, said tenant, entered into the occupation and possession of said premises under said hiring, and that you now use and occupy the same for an illegal trade [recite facts in relation thereto as in affidavit] contrary to the statute in such case made and provided, and that you, the said tenant, continue in such illegal use and occupation of said premises without the permission of the said landlord, and in violation of said statute. Therefore, in the name of the people of the state of New York, you are hereby summoned and required forthwith to remove from the said premises, or show cause before me at the court house, on the southwest corner of Chambers and Centre streets, in the city of New York, on the day of 187, at ten o'clock in the forenoon, why the possession of the said premises should not be delivered to the said landlord.

Witness my hand at the city of New York, this of 187.

DENIS QUINN,

Justice of the District Court in the city of New York,
for the first Judicial District.

7. Endorsement upon summons.

As to this endorsement, see form at pp. 257, 258 (*ante*), and see statute, § 3, p. 188 (*ante*).

8. Form of judgment.

The form of judgment is substantially the same as that given on p. 285 (*ante*), excepting as to the recital of facts.

9. Form of warrant.

In preparing the warrant in these proceedings, the form may be taken from those at pp. 293, 294, by substituting the facts recited in the summons in these particular proceedings, instead of those recited in said forms.

CHAPTER XXXV.

CERTIORARI TO REVIEW PROCEEDINGS AND PRACTICE
THEREON.

- I. To review proceedings on forcible entry and detainer.
- II. To review summary proceedings.

I.

To review proceedings on forcible entry and detainer.

Certiorari to review proceedings on forcible entry and detainer, may be granted, and the proceedings may be removed thereby into the Supreme Court, at any time after the finding of the inquisition by the jury of inquiry, and before the trial of the traverse of the inquisition by the second jury (*Haines v. Backus*, 4 *Wend.* 213; *Carter v. Newbold*, 7 *How.* 166); and a *certiorari* will not lie until after inquisition found (*Haines v. Backus*, *supra*). The *certiorari* must be allowed by a Justice of the Supreme Court (§ 19, *ante*, p. 180), or by a county judge (1847, p. 324, § 17, 10 *How.* 181). And the writ will not be allowed unless security be given as provided by section 20 of the statute (*Id. ante*, p. 180). The judge is required to annex and file the bond on his return to the writ (§ 21, *ante*, p. 181). And if the defendant omits to traverse the inquisition within such time as the court by rule shall direct, restitution shall be awarded by the court with costs, and if upon the trial of the traverse, the defendant be found guilty, the court shall also award restitution with costs, and in either case the court may authorize the complainant to prosecute the bond given on the allowance of the writ of *certiorari* (§ 22, *ante*,

p. 181). Where the proceedings are removed by *certiorari* into the Supreme Court, and the issue therein is ordered to be tried at the circuit, if the complainant do not proceed to trial, judgment as in case of non-suit will be granted with costs, same as in ordinary civil actions (*The People v. Hickox*, 3 *Hill*, 446). And where the complainant is successful in the Supreme Court he is also entitled to costs as in ordinary civil actions (3 *Hill*, 446; 6 *How.* 178; *Code*, § 318). And any party aggrieved by the decision of the Supreme Court, may have the decision reviewed by the Court of Appeals by writ of error, but not by appeal (*Code*, § 471; 19 *N. Y.* 584; 20 *Id.* 529; 18 *Id.* 487).

Petition for certiorari to remove proceedings.

To the Honorable the Supreme Court of the state of New York.

The Petition of Richard Roe, respectfully shows to this Honorable court, that on or about the day of , 1875, proceedings under the statute *in re* "Forcible Entry and Detainer," were instituted by John Doe against your petitioner, before Hon. Justice of the Marine Court of the city of New York, founded upon the complaint of the said John Doe, charging your petitioner with a forcible entry into and upon certain premises in said proceedings particularly described as follows (Here insert description): and with a forcible holding out therefrom.

That on the same day the said justice issued his precept to the sheriff of the city and county of New York, commanding him, according to the statute, to summon twenty-four inhabitants of said city, duly qualified as jurors, to appear before said justice at a time now past, as a jury of inquiry into the aforesaid complaint, and on the same day the said justice caused a notice of the issuing of said precept to be served on your petitioner, notifying him of the issuing of the precept, and that an inquisition would be held to inquire into the alleged forcible entry or detainer as aforesaid, on the day of , 1875, before said justice.

Your petitioner further shows that upon the return day, in said notice named, at the hour and place therein stated, your petitioner appeared before the said justice by his counsel Esq., for the purpose of objecting to the jurisdiction of said justice, and defending against the allegations contained in the complaint of the said John Doe, and that said counsel thereupon made the following objections, viz. (State them, although it is unnecessary, because the statute gives the absolute right of removal after inquisition, and before the trial upon the traverse thereto): which said justice overruled, and thereupon the inquiry proceeded, and the jury after being impanelled and sworn, and after evidence was had on the part of both parties, made, signed, and delivered to the justice, an inquisition,

wherein and whereby they found an inquisition, wherein and whereby they found, that on the day of , 1875, your petitioner, forcibly, unlawfully, and with strong hand, entered into, and expelled the said John Doe from the land and premises in such complaint and inquisition mentioned, and that the said John Doe then had, and now has, such a subsisting interest in said lands and tenements, as is referred to in the statute, and that the traverse to said inquisition has not yet been tried, and your petitioner desires to avail himself of the right given to him by statute of removing the trial of the said inquisition into this court upon the conditions mentioned in said statute.

Wherefore your petitioner prays that this court grant its writ of certiorari, and remove the trial of the said inquisition according to the statute in such case made and provided.

And your petitioner will ever pray.

RICHARD ROE.

Dated New York, 187 .
[Usual verification.]

Certiorari to remove proceedings.

The people of the state of New York to justice of the Marine Court of the city of New York, Greeting:

Whereas, we have understood, on the complaint of Richard Roe, that lately before you, a certain inquisition was found against him, for, &c. (state the findings of the jury). And we being willing for certain reasons, that the said inquisition, and all other proceedings concerning the same before you remaining, should be certified and returned by you into our Supreme Court of judicature, before our justices thereof, do command you that you certify and return the same into our justices of the Supreme Court of judicature, with all the proceedings thereto appertaining, at the next term of this court, to be held at the special term thereof at the court house, New York city, on the day of next, so that our said justices may further act thereon, as of right and according to law ought to be done; and have then there this writ.

Witness, Hon. Presiding Justice of the Supreme Court at the court house, New York city, this day of 187 . WM. WALSH, Clerk.

(Indorsed.) On the application of G. F. L., Attorney for Richard Roe, and upon the within petition dated the day of 187 , I allow the within writ of *certiorari* to issue.

Justice of the Supreme Court.

Bond of allowance of certiorari.

(See *ante*, § 20, p. 180.)

Know all men by these presents, That, &c. [in the usual form the obligee is the complainant; there must be two sureties, or, in case the defendant is absent, three sureties; penalty not less than one hundred dollars.]

The condition of the above obligation is such that if Richard Roe shall appear at the return of a certain writ of *certiorari*, issued out of the Supreme Court of this state, tested on the day of 187 , and returnable on the day of

187, and directed to Justice of the Marine Court of the city of New York, commanding him to certify the inquisition, and all other proceedings concerning a certain forcible entry alleged to have been made into certain lands and premises of John Doe, the obligee above named, by the said Richard Roe; and if the said Richard Roe shall answer to the inquisition found against him as aforesaid, and abide such order and judgment as the said Supreme Court shall make in the premises, and pay all costs that shall be awarded against him, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered } Signatures and seals of obligors.
in presence of }

[Add acknowledgment and affidavit of sureties in the usual form; also approval of sureties as follows:]

"I approve of the sureties in the above bond, and of the sufficiency thereof.

Justice of the Supreme Court."

Return of justice to certiorari.

(See *ante*, § 21, p. 181.)

The answer or return of _____, Justice of the Marine Court of the city of New York, to the writ of *certiorari* hereto annexed.

By virtue of, and in obedience to the writ of *certiorari*, hereto annexed, and to me directed, I do hereby certify, and return to the Justices of the Supreme Court, that on the _____ day of _____, last, the complaint of John Doe of the city of New York duly verified, was presented to me; which complaint, with the affidavit verifying the same, is hereto annexed.

That I did thereupon &c. [proceed in the same manner, and make return of all the proceedings down to the time of the service of the writ of *certiorari*].

All of which I do hereby certify and return, as within I am commanded.

In testimony whereof, I have hereinto set my hand and seal, this day of _____, in the year 187 _____.

Justice of the Marine Court.

Traverse in Supreme Court.

(See *ante*, §§ 21, 22, p. 181.)

(Same substantially as *Id.* p. 206.)

II.

To review summary proceedings.

Summary proceedings (except in cases before justices of the peace) can be reviewed only by certiorari to the Supreme Court (*The People v. Willis*, 5 Abb. 205 ;

The People *v.* Bigelow, 11 *How.* 83; Romaine *v.* Kinshimer, 2 *Hill.* 520, disapproving Davis *v.* Hudson, 5 *Abb.* 61). The office of the writ, is to correct errors of a judicial character (The People *v.* Board of Health, 33 *Barb.* 344; The People *v.* Van Alstyne, 32 *Id.* 131). And the Supreme Court has jurisdiction to award a certiorari, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute finally to hear and determine, if the jurisdiction be not taken away by express words (Lawton *v.* Commissioners, &c. 2 *Cai.* 179; Le Roy *v.* Mayor, &c., 20 *Johns.* 430; Lynde *v.* Noble, 20 *Id.* 80; 16 *Id.* 8; 23 *Wend.* 277). It is not to be allowed before the final adjudication below (Lynde *v.* Noble, *supra*; Delvin *v.* Platt, 11 *Abb. Pr.* 398); and the granting of the certiorari is in the discretion of the court (The People *v.* Supervisors, &c., 15 *Wend.* 198; The People *v.* Mayor, 2 *Hill.* 9; *Id.* 14; People *v.* Mayor, &c., 5 *Barb.* 43; People *v.* City of Rochester, 21 *Id.* 656; People *v.* Stilwell, 19 *N. Y.* 531; and see 1 *Hill.* 195; 33 *Barb.* 344).

At common law, and generally, the certiorari suspended the proceedings of the officer to whom it was directed (13 *Wend.* 664; Launitz *v.* Dixon, 5 *Sandf.* 249). And in the case of summary proceedings under the statute to recover the possession of land, the rule has been altered so far as the proceedings upon the application to the justice are concerned. Hence when a certiorari is issued it suspends the effect of the judgment of the justice, in every collateral matter, and in everything else except what remains to be done by the justice himself. It does not prevent him from issuing his warrant, but this is all (Launitz *v.* Dixon, *supra*). And the statute declares that the certiorari to review proceedings to dispossess shall not stay or suspend such proceedings (§ 47, *ante*, p. 193). And a motion to quash will be entertained where the writ has been is-

sued in an improper case (5 *How.* 378 ; 4 *Cow.* 73 ; 12 *Wend.* 241 ; 5 *Abb. Pr.* 194 ; 15 *Wend.* 198 ; 1 *Hill*, 195 ; 2 *Id.* 9). And the magistrate to whom the writ is directed, may test its regularity by not obeying its mandates (5 *How.* 378).

The writ must be returnable on the first day of the next general term, and the motion to quash should be there heard, and on a statutory certiorari under section 47, to review summary proceedings, the evidence should be returned, and the court may review its sufficiency, as well as questions of jurisdiction (*Niblo v. Post*, 25 *Wend.* 280, 311, following *Anderson v. Prindle*, 23 *Id.* 616, overruling *Birdsall v. Phillips*, 17 *Id.* 464 ; *Prindle v. Anderson*, 19 *Id.* 391 ; *Simpson v. Rhinelanders*, 20 *Id.* 103 ; *Wilson v. Green*, *Id.* 189 ; *Morewood v. Hollister*, 6 *N. Y.* 309 ; 5 *Id.* 383). And the fact that summary proceedings are conducted in a harsh and oppressive manner, and that the tenant may not have had actual notice of them are not grounds upon which the proceedings can be reversed on certiorari (*The People v. Simpson*, 37 *Barb.* 432). The general term on such certiorari may not only reverse the proceedings of the court below but may order restitution (§ 48, *ante*, p. 194), but restitution should not be awarded to the tenant if his term has expired before the judgment of reversal was rendered (*Chretien v. Doney*, 1 *N. Y.* 420). And on the reversal of such proceeding, the parties are restored to the position occupied before the proceedings were instituted entitling the plaintiff, however, by the express provisions of the statute (§ 49, *ante*, p. 194), to his action for damages ; and the ground of reversal is wholly immaterial (*Hayden v. The Florence Machine Co.*, 54 *N. Y.* 221).

Costs.

As to costs in these proceedings (see §§ 318 and 471 of the *Code*, and *Laws of 1854*, ch. 270, p. 592).

The rule in England as to the removal of convictions by certiorari.

In England *certiorari* is a writ issuing out of the crown office in the name of the king, or queen regnant, and tested by the chief justice, which the court of Queen's Bench, by virtue of its superintending authority over all courts of inferior criminal jurisdiction in the kingdom, has power to award, for the purpose of procuring an inspection of their proceedings. No writ of error lies on summary convictions, and therefore the writ of *certiorari* is the only mode by which a revision of these proceedings by the Superior Court can be obtained. It requires no special law to authorize this writ; for it is a consequence of all inferior jurisdictions of record, to have their proceedings removable, for the purpose of being examined by the court of Queen's Bench. In this respect the proceeding by *certiorari* differs from the right of appeal; for, whereas the latter does not exist, unless created by express provision, the other lies of course, unless expressly taken away by statute (*Paley on Convictions*, pp. 277, 278).

Form of petition for certiorari to review summary proceedings.

To the Honorable the Supreme Court of the State of New York.

The petition of Richard Roe respectfully shows to this Honorable court, that on or about the day of 187 , proceedings under the statute to recover the possession of land in certain cases, were instituted against your petitioner by John Doe, before

Esq., Justice of the Court, on the ground of (state the ground), and that on the return of the summons in said proceeding, your petitioner filed an affidavit denying all (or if not all, which) of the facts on which the summons was issued; and that the said justice then and there adjourned the trial of the issue raised in said proceeding until on which said last named day the said justice proceeded with the trial of said issue, and after hearing the testimony adduced, decided in favor of the said John Doe, and issued his warrant to dispossess your petitioner from said premises. That on said trial the said justice admitted testimony not legally admissible, and rejected testimony that ought to have been received, that is to say (state the facts); and that said decision was contrary to and against the evidence adduced before said justice, and

the said justice committed other errors of law and fact in the course of said trial, and of the proceedings connected therewith (state the errors in detail), as will appear on the face of said proceedings, and, by reason of the matters aforesaid, your petitioner has been greatly injured by being dispossessed from said premises, and otherwise to his great damage. Wherefore your petitioner prays that a writ of certiorari may issue, directed to the said justice, commanding him to return said proceedings, with the proofs and exhibits therein, to this Honorable court, to the end that the said errors may be corrected, and justice be done. And your petitioner will ever pray.

Dated New York, 187 .

[*Usual verification.*]

Order directing certiorari to issue to review summary proceedings.

At a special term of the Supreme Court of
the state of New York, held at the City
Hall, in the city of New York, on
day of 187 .

Present Hon.

Justice.

THE PEOPLE *ex rel.* RICHARD ROE,

v.

JOHN DOE.

On reading and filing the petition of Richard Roe, praying that a certiorari issue to Esquire, Justice of Court, to certify certain proceedings had before him, to recover the possession of certain premises, described in the affidavit and summons annexed to said petition, as follows: (describe premises).

It is therefore, on motion of attorney and of counsel for said Richard Roe, hereby ordered that a certiorari for the purpose aforesaid, issue to the said Esq., the Justice aforesaid, commanding him to certify and return to this court the said proceedings and the adjudication by him thereon had, and all proofs and exhibits in any manner relating thereto.

Writ of certiorari to review summary proceedings.

The people of the state of New York to Justice of the Marine Court of the city of New York, send greeting:

We being willing for certain reasons to be certified of certain proceedings lately instituted and had before you between John Doe as landlord, and Richard Roe as tenant, upon application of the said John Doe to remove the said Richard Roe from certain premises in the city of New York, under the statute to recover the possession of land in certain cases, for holding over and continuing in the possession thereof, without the permission of the said landlord, after the expiration of the term of the said tenant as is alleged, in which such proceedings were had upon the application aforesaid before you, that an adjudication was made thereon against the said Richard Roe as it is said: Do command you that you certify and return all and

singular the original proceedings and adjudication aforesaid, and all things in any manner appertaining or relating thereto, to our Supreme Court of judicature, at the Court House, City Hall park, in the city of New York, on the day of 187 , under your hand, as fully and amply as the same remain before you, so that our said Supreme Court may further cause to be done thereupon what of right and according to law ought to be done, and have you then and there this writ.

Witness, Hon. Presiding Justice of our said Supreme Court at the Court House in the city of New York, the day of 187 .

By the Court.

WM. WALSH,
Clerk.

Endorsed.)
Allowed

187 .

Justice.

Return of justice.

The answer or return of , Justice, to the writ of certiorari hereto annexed is as follows:

In obedience to the said writ, to me directed, I do hereby certify and return.

[Here state all the facts, with the adjudication thereon; annex all the original papers or copies of them.]

All of which is respectfully submitted. New York, , 187 .

Justice.

[See form of justice's return at pp. 335, 336, *post*.]

Order of reversal of summary proceedings.

At a General Term of the Supreme Court, of the state of New York, held at the City Hall, in the city of New York, on the day of , A. D. 187 .

Present Hon. , Justices.

THE PEOPLE *ex rel.* RICHARD ROE
v.
JOHN DOE.

The certiorari hercin to Esq., Justice of the District Court, in the city of New York, for the judicial district, coming on for argument in its order on the calendar, and after hearing , counsel for the relator herein, and

 , counsel for the respondent,
It is hereby ordered that the judgment and adjudication of the said , justice, be, and the same is hereby in all things reversed, with costs.—And it is further ordered, that , the relator herein, be restored and put into possession of the premises from which he was dispossessed under the warrant issued by said justice upon the said judgment hereby reversed, said premises be-

ing described as follows: "the rooms on the floor, in the dwelling known as No. street, in said city of New York, and for that purpose it is ordered that a writ of restitution issue, directed to the sheriff of the city and county of New York, commanding said sheriff forthwith to restore the said relator to the immediate possession of the said premises.

Writ of restitution in summary proceedings.

The people of the state of New York, to the sheriff of the city and county of New York, send greeting:

Whereas, Richard Roe, of said city and county of New York, by certain proceedings, had before Esq., Justice of the District Court in the city of New York, for the judicial district, under the provisions of article second, title ten, of chapter eight, of part third, of the Revised Statutes, entitled "summary proceedings to recover the possession of land in other cases," was removed from the possession of the rooms on the floor of the dwelling, known as No. street, in the city of New York, and situate in said street, and which proceedings we caused to be removed into our Supreme Court of Judicature, by our writ of certiorari; and whereupon it was considered in our said court, after argument before our said justices, that the said Richard Roe should be restored to the possession of the said premises, whereof the said Richard Roe is convicted, as appears to us of record.—Now, therefore, we command you forthwith to restore the said Richard Roe to the full possession of the aforesaid described premises; and how, and in what manner you shall have executed this our writ, make appear to our Supreme Court, at the city and county of New York, on the day of , A. D. 187 , and have then and there this writ.

Witness Hon. , Presiding Justice of the Supreme Court, at the City Hall, in the city of New York, this day of , 187 .

[L. s.]

WM. WALSH, Clerk.
, Attorney for relator.

(Endorsed.)

Allowed,

187 .
Justice.

CHAPTER XXXVI.

REVIEW BY APPEAL OF SUMMARY PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

- I. The verdict of the jury or decision of the magistrate to be entered in the justice's docket.
- II. Form of warrant by justice of the peace.
- III. Review of adjudication upon appeal by the county court with the forms required upon such appeal.

I.

The verdict of the jury or decision of the magistrate to be entered in the justice's docket.

In case of proceedings before a justice of the peace under the statute, the justice shall enter the findings of the jury, or in case no jury is called according to the provisions of the statute, his final decision upon the application for a warrant, in his docket, and render judgment therefor, and include in such judgment costs in such proceeding to the prevailing party at the same rate of fees now allowed by law in civil actions in courts of justices of the peace, and limited in like manner, and in the warrant for delivery of possession, or by execution issued by him, the justice shall direct the collection of such costs.

The justices' docket may be in the following form :

Form of justice's docket.

Before	Esq., Justice of the Peace.	
JOHN DOE, landlord,	}	Summary proceedings to remove Richard Roe, tenant of premises No. street, in the town of
v.		
RICHARD ROE, tenant.		

1875. Nov. 1. Landlord presents oath in writing under the act,

1875. Nov. 1. Issued summons returnable Nov. 4, 1875, at 1 P. M.
at my office.
- “ “ 4. Tenant appeared and filed counter affidavit, and demanded jury trial, and paid fees \$, and proceedings adjourned for trial, till Nov. 6, 1875, 1 P. M.
- “ “ 4. Issued precept for jury, and delivered same to constable Smith.
- “ “ 6. Proceedings tried by a jury, who rendered a verdict for the landlord. Plaintiff's costs [here state the costs], judgment for possession of the premises claimed, with \$ costs.
- “ “ 6. Issued warrant to Constable Smith, for the delivery of possession to plaintiff, and also to collect the said judgment.

II.

Form of warrant by justice of the peace.

The warrant to be issued by justices of the peace in these proceedings may be in the forms suggested at pages 293, 294; adding at their conclusion, and just above the attestation clause, a direction to collect the costs in the form following: “And you are also hereby commanded, in the name of the people of the state of New York, to levy and collect the sum of dollars, for the costs of the said proceedings, out of the goods and chattels of the said tenant (Richard Roe), excepting such as are by law exempt from execution, and to bring the money which you shall collect within sixty days from the date hereof, before me at my office, in the town of in the county of New York, to satisfy the same.”

Given under my hand at the town, county, and state aforesaid,
this day of 187 .

Justice of the Peace.

III.

Review of adjudication upon appeal, with the forms required upon such appeal.

The review by appeal to the county court of the county in which the proceeding was had, can only be had in the case of a proceeding before a justice of the peace (see § 51 of the statute, *ante*, p. 195, and see *certiorari*, Chapter XXXV. *ante*, p. 317). The statute provides that the proceedings before said justice may be removed by appeal to the county court of the

county, in the same manner and with like effect, and upon like security as appeals from the judgment of justices of the peace in civil actions, except that the decision of such county judge shall be an affirmance or reversal of such judgment, and be final (§ 52 of the statute, *ante*, p. 195). But in addition to the security for such judgment as required by law in case of such appeal, *in order to stay* the issuing of the warrant or execution there shall, in case of appeal by the tenant, be security also given for the payment of all rent accruing or to accrue upon said premises, subsequent to the said application to such justice (*Id.*).

No appeal under the act is allowed unless such security for said judgment shall be given and approved by the judge at the time of allowing such appeal, and served on the justice with the affidavit of appeal (*Id.* § 53, *ante*, p. 195). The section just cited, provides that the security shall be approved of by the judge, but that means when the proceedings are before a justice of the peace, it may be approved by him.

The notice of appeal must be in writing stating the grounds thereof, and must be served within twenty days after the judgment is rendered.

The statute in regard to appeals from justices of the peace is contained in the Code (§§ 351 to 371, both inclusive), and is as follows :

Existing laws repealed and this chapter substituted.

Code, part of § 351. All statutes now in force providing for the review of judgments in civil actions, rendered by courts of justices of the peace * by the municipal court of the city of Brooklyn, and by the justices' courts of cities, and regulating the practice in relation

* The Marine Court and District Courts in the city of New York, are omitted from the section to prevent confusion, the remedy for errors committed by the justices of those courts in summary proceedings being by certiorari to the Supreme Court and not by appeal (see Chapter XXXV., *ante*, p. 317).

to such review are repealed ; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

By what courts judgments are to be review ed.

Code, part of § 352. In the city of Buffalo, the appeals from the courts of justices of said city shall be to the Superior Court of said city. When rendered by any of the other courts enumerated in section 351, the appeal shall be to the county court of the county where the judgment was rendered.

The note to section 351, is also applicable to this section, and the provision for a new trial in the county court is omitted because inapplicable to these proceedings for the decision of the county judge on appeals from judgments in summary proceedings is by statute required to be only an affirmance or reversal of the judgment, and is declared to be final (see § 52 of statute, *ante*, p. 195). The appellate jurisdiction in these proceedings is merely of *errors* in the court below ; the judgment is merely affirmed or reversed, and the whole proceedings are like those formerly had on *certiorari* (*Pruyn v. Tyler*, 18 *How.* 331 ; *Whitney v. Bayard*, 2 *Sandf.* 634).

Notice of appeal to state grounds thereof.

Code, § 353. The appellant shall, within twenty days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process, not personally served, and the defendant did not appear, he shall have twenty days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next section.

Must specify the grounds.

The notice of appeal should clearly specify the errors relied on for reversal (1 *Hill.* 73, 199 ; *Id.* 393 ; *Id.* 537 ; 6 *Abb.* 183 ; 15 *How.* 32 ; 16 *Id.* 471), and although the notice of appeal must be served within twenty days after the judgment (1 *Code R.* 54 ; 7 *How.* 108), the objection that the service was not made in time, must be by motion to dismiss (2 *E. D. Smith*, 139).¹

Form of notice of appeal.

Before

Esq., Justice of the Peace.

JOHN DOE, as landlord,

v.

RICHARD ROE, as tenant.

To the said justice, and to John Doe, the landlord above referred to, Gent.

Take notice that the tenant above named hereby appeals to the county court of _____ county, from the judgment rendered in favor of said landlord and against said tenant, in the proceedings tried before said justice, on the _____ day of _____ 187____, wherein John Doe as landlord was the applicant for the possession of the premises known as No. _____ street in the town of _____ in the county of _____ in the state of New York, and in which Richard Roe was the tenant, and that the following are the grounds of such appeal [here state with particularity the grounds of appeal in detail].

Dated

187____

Tenant.

By JOHN FERGUSON.
his attorney,

No. _____

street,

Town of _____

county.

[The statute in reference to these appeals speaks of an "affidavit for appeal" (*vide* § 53, *ante*, p. 195), as if to require such affidavit, with the notice; but the explanation to this probably is that by the Revised Statutes (2 *R. S.* 258) an appeal from a judgment rendered by a justice of the peace in a civil action was not of course, and was effected only by the presentation by the aggrieved party to a justice of the Supreme Court of an "*affidavit*" setting forth his ground of appeal as upon certiorari; and if the judge deemed the alleged ground sufficient, he endorsed on the affidavit an allowance of the appeal. By the Code this mode of appeal was changed, and the only mode now recognized is that prescribed by § 351 (*ante*, p. 326). This provision was no doubt overlooked at the time the reference to an affidavit was made in § 52.]

The right to appeal under the Code is absolute, while under the former rule it was not.

Service of notice of appeal. Undertaking to be given.

Code, part of § 354. The notice of appeal must, within the same time, be served on the justice personally, if living and within the county, or on his clerk, if there be one, and on the respondent, personally, or by leaving it at his residence with some person of suitable age and discretion; or in case the respondent is not a

resident of such county, or can not after due diligence be found therein, in the same manner on the attorney or agent, if any, who is a resident of such county, who appeared for the respondent on the trial ; and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent, by leaving it with the clerk of the appellate court ; and the appellant must, at the time of the service of the notice of appeal on the justice, or on his clerk, as herein provided, pay to such justice or clerk, the costs of the action included in the judgment, together with two dollars costs of the return, which shall be included in the judgment for costs on reversal ; and the appellant shall also execute, on the appeal, a written undertaking on his part, with one or more sufficient sureties, to the effect that the appellant will pay all costs, disbursements, and extra costs awarded against him in the court below, if such judgment shall be affirmed by the appellate court, on such appeal, together with all costs and damages which may be awarded against him thereon ; such sureties to justify in double the amount specified in the undertaking, such undertaking and the sufficiency of the sureties to be approved by the justice of the court below, or one of the judges of the Court of Common Pleas ; or the appellant may deposit with the clerk of the Court of Common Pleas the costs, disbursements, and extra costs included in the judgment in the court below, and the sum of fifteen dollars, to meet any costs that may be awarded against him in such appeal ; the undertaking, when executed and approved, to be filed with the clerk of the Court of Common Pleas ; the amount so deposited shall be repaid by said clerk to the appellant, if he succeed on the appeal ; and in case the judgment be affirmed, the said clerk shall, after execution is issued, pay over the amount so deposited, to the respondent, which shall be credited on the execution issued on the judgment of affirmance, to the extent

thereof, and the balance, if any, on the execution issued on the judgment appealed from.

[The note to § 351 is applicable to this section. The reference to the Common Pleas in the part of this section retained evidently refers to appeals from the Marine and District Courts in the city of New York. As to approval of undertakings on appeal to the county court, see § 356, *post*, p. 331.]

Service of notice of appeal.

Where the respondents are joint owners, service of the notice of appeal on one will suffice for all (*Geisler v. Acosta*, 9 *N. Y.* 227; *Mandeville v. Reed*, 13 *Abb. Pr.* 173). And unless the costs and return fee are first paid, the justice can not be compelled to make a return (*Aldrich v. Ketchum*, 12 *N. Y. Leg. Obs.* 319; *Van Heusen v. Kirkpatrick*, 5 *How.* 422; *S. C. 1 Code R. (N. S.)* 74; *Bray v. Redman*, 6 *Cal.* 287). If the non-payment of the fee is the reason why the return is not made, that fact is ground for dismissing the appeal (*Van Heusen v. Kirkpatrick*, *supra*). If the justice has made his return without payment of his costs and fee, that fact is no ground for dismissing the appeal (*Bray v. Redman*, 6 *Cal.* 287; *Van Heusen v. Kirkpatrick*, *supra*).

2. Security upon appeal to county court without stay of proceedings.

Before

Esq., Justice of the Peace.

In the summary proceedings where-
in JOHN DOE is landlord

and

RICHARD ROE is tenant.

Whereas on the _____ day of _____ 187____, in proceedings under the statute in relation to summary proceedings to recover the possession of land, John Doe as landlord recovered a judgment against Richard Roe as tenant, for the possession of the premises known as _____ street, in the town of _____ in the county of _____ and state of New York, with \$ _____ costs. And the above named appellant, feeling aggrieved thereby, has appealed therefrom to the county court of the county of _____

Now, therefore, we, Richard Roe, of No. _____ street in the town of _____ county of _____ New York, and John Smith, of No. _____ street in said town do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs, disbursements, and extra costs awarded against him in the court below, if such judgment shall be affirmed, or if the appeal be dismissed, together with all costs and damages which may be awarded against the said appellant thereon; and do also undertake that if judgment be rendered against the appellant, and exe-

Dated, the day of 187 .
RICHARD ROE.
JOHN SMITH.

County of New York, ss.

JOHN SMITH.

Acknowledgment.

3. Security upon appeal for the purpose of staying proceedings.

This form is the same as the preceding one with the addition of the following condition: And we further undertake and promise that we will pay all the rent that has accrued or may accrue upon said premises mentioned, and described in said proceedings, subsequent to the said application to said justice.

The usual justification of the surety as to his qualifications and acknowledgment of execution by the parties are to be added. When the undertaking is to stay the warrant, the justice must be guided as to the number of the sureties, and the amounts in which they must justify, by the amount of the annual rents, and the probable time that will elapse before a decision on the appeal can be obtained, and the undertaking should be proved or acknowledged (*Benedict's Pr.* pp. 703, 704, 5th ed.).

§ 356. The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the county judge, or by the court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied in

whole or in part, the sureties will pay the amount unsatisfied.

[As to form of undertaking, *vide* pp. 330, 331, §§ 52, 53 of statute, *ante*, p. 195.¹

Errors and omissions.

A misstatement of the date of judgment in an appeal bond is fatal (3 *Wend.* 426); it is erroneous, however, to dismiss an appeal because the bond omits the date (2 *Wend.* 292); and an undertaking which substantially conforms to the above section is sufficient (31 *N. Y.* 350), and an appeal without an undertaking is a nullity (38 *Barb.* 238).

Execution, how stayed.

§ 357. The delivery of the undertaking to the court below shall stay the issuing of execution; or if it have been issued, the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, shall stay further proceedings thereon.

Effect of appeal and extent of stay.

The undertaking stays all further proceedings, but does not affect those already had (2 *E. D. Smith*, 259). And the provision in relation to summary proceedings to recover the possession of land which authorizes such proceedings, when instituted before a justice of the peace, to be removed by appeal to the county court, in the same manner and with the like effect, as appeals from the judgments of justices of the peace in civil actions, and which directs, that in case of appeal by the tenant, in order to stay the issuing of a warrant or execution, security shall also be given for the payment of all rent accruing, or to accrue upon the premises subsequent to the application to the justice, does not apply—so far as relates to a stay—to proceedings instituted against a tenant solely on the ground that he is holding over after the expiration of his term. That section of the statute does not create a right to stay the issuing of a warrant in a case where it did not previously exist, but it merely provides that in order to exercise the right to stay, in cases where it previously existed, security shall be given as therein prescribed, and an appeal to the county court, taken by virtue of the act of 1849, of itself, merely transfers the proceedings to the county court for the purpose of review, but does not affect the power of the justice to issue a warrant to enforce his judgment, and a warrant so issued, being regular and valid, and the landlord having been put into possession of the premises by virtue of it, he is justified in using so much force as is necessary to defend himself and maintain his possession. And in an action against him by the tenant, for an alleged assault and battery committed in repelling the attempt of the tenant to re-enter, the only question for the jury is whether the defendant used an excess of force. And even though it be assumed that a justice of the peace has not power to issue a warrant to dispossess a tenant after an appeal by the latter to the county court, yet his judg-

ment until reversed or set aside, is of force as an adjudication, and it determines that the lease has expired, and the landlord is entitled to the possession of the premises. The fact that an appeal has been taken does not affect the conclusive nature of the judgment as a bar, while it remains unreversed. It is, therefore, erroneous to charge that the judgment ceased to be *res adjudicata*, when the appeal was perfected. Where the landlord and owner in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, the latter has no right to take the law into his own hands and attempt to dislodge the former by force. The landlord, being in the actual possession, has a right to maintain it, and to use force, if necessary, for that purpose (*Sage v. Harpending*, 49 *Barb.* 166).

In case of death of justice, undertaking to be filed.

Code, § 358. Where, by reason of the death of a justice of the peace, or his removal from the county, or any other cause, the undertaking on the appeal can not be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent, or his attorney or agent, as provided in § 354; it shall thereupon have the effect as if delivered to the justice.

Filing notice of appeal instead of service.

Code, § 359. When, by reason of the death of a justice of the peace, or his absence from the county, or any other cause, the notice or appeal can not be served as provided by § 353, it may be served by leaving the same with the clerk of the county.

Return, when and how made and compelled.

Code, § 360. The court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings, and judgment, and file the same in the appellate court. The return may be compelled by attachment. But no justice of the peace shall be bound to make a return unless the fees prescribed by the last section of this chapter be paid on

the service of the notice of appeal ; provided, however, that in cases where the amount for which judgment is demanded by either party in his pleadings in the court below exceeds fifty dollars, or where the value of the property recovered, as appears from the verdict or judgment, shall exceed fifty dollars, the testimony need not be returned ; but in such case the court below shall return the process by which the action was commenced, with the proof of service thereof, and the pleadings or copies thereof, the proceedings and judgment, together with a brief statement of the amount and nature of the claim or claims litigated by the respective parties, and in all cases the notice of appeal shall be annexed to the return ; but in cases where the appellant shall, in accordance with the provisions of § 352 of this act, state in the notice of appeal, that such appeal is taken upon questions of law only, the court below shall return to the appellate court the testimony, proceedings, and judgment.

[It is evident that on appeals from judgments in summary proceedings the testimony must be returned without any regard to the amount recovered, or the value of the property in controversy. The exception made in cases where the recovery exceeds fifty dollars relates only to ordinary civil actions in which new trials may be had in the county court, and on that account the portion of § 352 referred to in the above section (360) was not printed herein.]

The return, what to contain.

The return should set forth the day whereon judgment was rendered, the date of the trial, the day issue was joined, the adjournments, to what time, and the date when the process was returnable (*Peters v. Diossy*, 3 *E. D. Smith*, 115). The pleadings as well as the evidence, must be contained in the return (*Roulston v. McClelland*, 2 *Id.* 60). See, also, *Smith v. Van Brunt* (*Id.* 534). All the testimony received by the justice on the trial must be contained in the return to an appeal under the Code (*Orcutt v. Cahill*, 24 *N. Y.* 578; *Ogden v. Sanderson*, 3 *E. D. Smith*, 167. See, however, *Low v. Payne*, 4 *N. Y.* ; 4 *Comst.* 247; *Prosser v. Secor*, 5 *Barb.* 607). The return of the court below must contain *all* the testimony and proceedings. Where the return is not sufficient to present the whole case, the parties must call for a further return (*McCafferty v. Kelly*, 2 *Sandf.* 637; *Belshaw v. Colie*, 3 *Code R.* 184).

The appeal will be dismissed where no notice of appeal is attached to the return (*Cabre v. Sturges*, 1 *Hilt.* 160; *Bush v. Dennison*, 14 *Hov.* 307). Unless the contrary distinctly appears, it will be pre-

sumed, where the justice's return sets forth evidence in detail, that the whole testimony is given; it will not be presumed that the justice had evidence before him on the trial which he does not embody in the return (*Orcutt v. Cahill*, 24 *N. Y.* 578; *Hanee v. Cayuga and Susquehanna Railroad Co.*, 26 *N. Y.* 428; *Calligan v. Mix*, 12 *How.* 495; the head-note in this case is incorrect; 13 *How.* 96, corrects it. See, however, *Low v. Payne*, 4 *N. Y.*, 4 *Comst.* 247; *Prosser v. Secor*, 5 *Barb.* 607). The return of the justice must show what judgment was rendered; unless this is done the appeal will be dismissed, with costs (*Woodside v. Pender*, 2 *E. D. Smith*, 390; *contra*, *Klenck v. DeForest*, 3 *Code R.* 185).

If the return is lost, the parties may consent that the justice sign the copy submitted, and add the pleadings, or obtain a new return. Unless the papers are properly submitted, the appeal will be dismissed (*Smith v. Van Brunt*, 2 *E. D. Smith*, 534).

Impeaching return.

The justice's return is conclusive as to the statements contained in it; it can not be impeached or contradicted by affidavit. The only way that the return can be corrected is by motion to the court (*Spence v. Beck*, 1 *Hill.* 276; *Kilpatrick v. Carr*, 3 *Abb.* 117; *Mitchell v. Menkle*, 1 *Hill.* 142; *Kelly v. Brower*, *Id.* 514), and the averment that it is untrue, or incorrect and defective in its statements, or that it contains immaterial matters, is not sufficient. Nor is the fact that the attorney for the defendant in error drew up the return, and that it was afterwards "corrected, altered, and fixed," by the justice, unless abuse is clearly shown (*Smith v. Johnson*, 30 *How.* 374; see, also, *Hunter v. Graves*, 4 *Cow.* 537), and the return of the constable, that he served the summons, is conclusive. It gives the justice jurisdiction to proceed with the cause at the hour when the summons was returnable; and it can not be impeached or brought in question on an appeal from the judgment. If the constable did not serve a copy of the summons, the defendant must seek his remedy against the constable by an action for a false return (*Haughey v. Wilson*, 1 *Hill.* 259). But in some of the cases it was held that upon an appeal the false return may be questioned, if such point is raised as error in fact (See the following cases: *Col. Insurance Co. v. Force*, 8 *How.* 353; *Putman v. Man*, 3 *Wend.* 202; *Allen v. Martin*, 10 *Id.* 300; *Elwell v. McQueen*, *Id.* 519; *Case v. Redfield*, 7 *Id.* 398; *Beaty v. Perkins*, 6 *Id.* 382; *Brintnall v. Foster*, 7 *Id.* 103).

False return.

A justice of the peace is liable for a false return to an appeal, for any damages which a party to such appeal may sustain by reason of such false return. He acts ministerially in making a return to an appeal (*MacDonell v. Buffum*, 31 *How.* 154; *Houghton v. Swarthout*, 1 *Denio*, 589; see, also, *Tompkins v. Sands*, 8 *Wend.* 462; *Cunningham v. Bucklin*, 8 *Cow.* 178; *Scott v. Rushman*, 1 *Id.* 212).

Form of justice's return.

[*Title of proceedings.*]

To the County Court of the county of

In obedience to the requirements of section 360 of the Code of

Justice of the Peace.

How made, if justice be out of office.

Code, § 361. When a justice of the peace, by whom a judgment appealed from was rendered, shall have gone out of office before a return is ordered, he shall, nevertheless, make a return in the same manner, and with the like effect, as if he were still in office.

Further return may be ordered.

Code, § 362. If the return be defective, the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with its order by attachment; and the court shall always be deemed open for these purposes.

Return conclusive.

Affidavits can not be used to modify or impeach the return; the appellate court must be bound by it. If all the facts are not stated, the party aggrieved must procure an amendment (*Lynsky v. Pendergrast*, 2 *E. D. Smith*, 43; *Kilpatrick v. Carr*, 3 *Abb.* 117; *Capewell v. Ormsby*, 2 *E. D. Smith*, 180; *Trust v. Delaplaine*, 3 *Id.* 219; *Hyland v. Sherman*, 2 *Id.* 234; *Rawson v. Grow*, 4 *Id.* 18; *Bates v. Conkling*, 10 *Wend.* 389). In such a case, an amended return will be ordered, and upon proper application the justice will be required to answer specific interrogatories in regard to any matters clearly material to the case (*Smith v. Johnston*, 30 *How.* 374). And a party may compel the return of evidence that was stricken out in the court below, in order that he may bring more distinctly before the appellate court the points relied upon for a reversal of the decision (*Id.*).

How to procure amended return.

If either party be dissatisfied with the return made by the justice, he can move the county court at any time for an order requiring an amended return. The motion should be made upon affidavits showing the inaccuracies and omissions complained of, and may be brought on upon an order to show cause in the following form, or upon a notice of motion of the same purport.

Order to show cause why amended return should not be made.

County court of the county of

JOHN DOE, Respondent, v. RICHARD ROE, Appellant.	}
--	---

Upon the annexed affidavit, let

the justice be-

fore whom this proceeding was tried, file an amended return herein, answering the interrogatories hereinafter propounded, or show cause before the county court of _____ county, on the day of _____ 187 , at ten A. M. of that day, at the court house, at _____ in said county, why the said justice should not make a further and amended return in said proceeding, by answering the following interrogatories, viz. :

First. Whether or not John Jones, a witness called and sworn for the landlord, testified on his direct examination as follows (Here state the testimony called for).

Second. Whether or not Paul Jones, a witness called and sworn for the tenant, testified on his cross-examination as follows (Here state the testimony called for).

Third. Whether or not the tenant objected to the testimony of (Here state the particular testimony objected to, with the objection thereto and exception).

Fourth. Whether or not, at the close of the testimony, the tenant moved for a non-suit on the grounds (Here state the grounds fully).

Fifth. Whether or not the paper referred to in said affidavit as Exhibit No. 1, was offered in evidence by the tenant's counsel, and whether it was excluded by you, and whether he excepted to your decision ruling it out.

Sixth. (State any other proposition or interrogatory that may be proper), and why the tenant should not have such other and further relief as may seem proper in the premises; and that a copy of this order be served upon the attorney for the landlord herein before the hearing of said motion.

... Dated

187

County Judge.

If justice be dead, insane, or absent from State, witnesses to be examined ; if in another county, return may be compelled.

Code, § 363. If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the state, the appellate court may examine witnesses, on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the state, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

Return in case of justice whose term of office has expired.

A return to a writ of certiorari or to an appeal, may be made by a justice of this court, and is valid, notwithstanding the judge's

official term has expired. The rule is the same whether or not the writ is served or the appeal brought, or before or after he has gone out of office (*Conover v. Devlin*, 15 *How.* 470; S. C. 6 *Abb.* 228, sub. nom. *People ex rel. Devlin v. Peabody*, and numerous cases cited in this case (*Harris v. Whitney*, 6 *How.* 175, overruling *Peck v. Foot*, 4 *Id.* 425).

Hearing upon return. Dismissing appeal if not brought on.

Code, part of § 364. If a return be made, and the appeal is from a judgment where a new trial may not be had, as provided by this chapter, it may be brought to a hearing at a general term of the appellate court, upon notice by either party of not less than eight days. It shall be placed upon the calendar, and continue thereon without further notice until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order for cause shown.

The balance of this section relates to new trials in the county court, and has no application to summary proceedings, and is therefore omitted.

Only one notice necessary.

After an appeal has been once regularly noticed for argument by either party, and regularly placed on the calendar, it remains thereon without further notice until finally disposed of; and where an appeal was once noticed for argument and placed on the calendar by the appellant, and was called at a subsequent term, and the appellant not appearing, the respondent took a judgment of affirmance by default, without any proof of his having noticed the appeal for argument; held regular (*Townsend v. Keenau*, 2 *Hilt.* 544).

To be heard on original papers.

§ 365. The appeal shall be heard on the original papers, or certified copies thereof; and no copies thereof need be furnished for the use of the court.

Hearing in county court.

On such appeal the appellate court will not review matters of discretion or questions of practice (1 *Hilt.* 142); and will look only to the justice's return (1 *Id.* 143); and are bound by it; affidavits in addition thereto can not be used (2 *E. D. Smith*, 43; *Id.* 180; *Id.* 234;

3 *Id.* 219; 4 *Id.* 18; 3 *Abb.* 117); and every reasonable intendment will be made to support the judgment (44 *Barb.* 459); and the court should give the proceedings a fair and liberal construction (28 *N. Y.* 117); and a judgment should not be reversed unless it clearly appears that the evidence does not justify it, even although the appellate court might have arrived at a different conclusion (31 *N. Y.* 480; 25 *How.* 465; 1 *Daly*, 283; 31 *How.* 372). The fact that irrelevant or improper evidence was admitted, is no ground for reversing the judgment, where there was abundant competent evidence presented (*Spencer v. Saratoga and Washington Railroad Co.*, 12 *Barb.* 382; *Bort v. Smith*, 5 *Id.* 283; *Moore v. Somerindyke*, 1 *Hilt.* 199; *Buck v. Waterbury*, 13 *Barb.* 116; *Andrews v. Harrington*, 19 *Id.* 343). It is a well-settled rule that a judgment will not be set aside, even on a bill of exceptions, for testimony erroneously admitted, when the court can see clearly that it has occasioned no injury to the party objecting (*Welles v. Cone*, 55 *Barb.* 585, 589. See, also, *Bort v. Smith*, 5 *Id.* 283, 285; *Crary v. Sprague*, 12 *Wend.* 41; *Benjamin v. Smith*, *Id.* 404). If, however, the evidence is clearly illegal, and affects a material issue in the case, and a proper objection is taken, if it is admitted, and judgment is rendered against the party, it is good ground for reversing the judgment (*Williams v. Fitch*, 18 *N. Y.* 546; *Erben v. Lorillard*, 19 *N. Y.* 299, rev'g S. C. 23 *Barb.* 82; *Worrall v. Parmelee*, 1 *N. Y.* 519; *Wilmot v. Richardson*, 6 *Duer*, 328; *Murray v. Smith*, 1 *Id.* 413; *Tuttle v. Hunt*, 2 *Cow.* 436; *Whiting v. Otis*, 1 *Bosw.* 420, 424; *Dresser v. Ainsworth*, 9 *Barb.* 619; *Ward v. Washington Insurance Co.*, 6 *Bosw.* 230; *Penfield v. Carpenter*, 13 *Johns.* 350; *Weber v. Kingsland*, 8 *Bosw.* 415, 443; *Hahn v. Van Doren*, 1 *E. D. Smith*, 411; *Main v. Eagle*, *Id.* 619, 620; *Belden v. Nicolay*, 4 *Id.* 14, 17; *Anthoine v. Coit*, 2 *Hall*, 40; 4 *E. D. Smith*, 171); and the court will not consider objections urged for the first time on appeal (1 *N. Y.* 92; 1 *Hilt.* 537; *Id.* 531; *Id.* 161; *Id.* 72; 3 *E. D. Smith*, 310; 3 *Sandf.* 399; 4 *Id.* 109; 4 *E. D. Smith*, 473). Where the matters relied upon as the grounds for reversing the judgment are omitted in the return, the appellant should procure an amended return that will show fully the alleged errors and irregularities (*Baum v. Tarpenny*, 3 *Hill*, 75; *Stafford v. Williams*, 4 *Denio*, 182; *Rawson v. Grow*, 4 *E. D. Smith*, 18; *Capewell v. Ormsby*, 2 *Id.* 180; *Warring v. Loomis*, 4 *Barb.* 485; *Fairbanks v. Corlies*, 3 *E. D. Smith*, 583; S. C. 1 *Abb.* 150). The original return should be filed, as required by statute, and if an amendment is regarded necessary, affidavits may be used for the purposes of the motion (*Lynsky v. Pendergrast*, 2 *E. D. Smith*, 43; *Fish v. Ferris*, 3 *Id.* 568, 569; *Capewell v. Ormsby*, 2 *Id.* 180). The appeal should not be argued until the return is complete, for the reason that it is conclusive as to what transpired at the trial in the court below. Affidavits can not be used to support a defective return (*McAllister v. Sexton*, 4 *E. D. Smith*, 41; *Hyland v. Sherman*, 2 *Id.* 235; *Trust v. Delaplaine*, 3 *Id.* 219; *Rawson v. Grow*, 4 *Id.* 18; *Kilpatrick v. Carr*, 3 *Abb.* 117). The rule is the same with regard to the charge of the justice to the jury (*Garrison v. Pierce*, 3 *E. D. Smith*, 255).

Objections and exceptions.

Any objection that by possibility could be obviated on the trial must be then and there made, or is unavailable on appeal (1 *N. Y.* 92;

3 *Sandf.* 399; 4 *Id.* 109; 4 *E. D. Smith*, 473; 1 *Hilt.* 537; *Id.* 531; *Id.* 161; *Id.* 72; 3 *E. D. Smith*, 310). And see effect of appearance at pages 77 and 78, and a general exception to a charge of a justice is unavailable, unless it is entirely erroneous (11 *Barb.* 520; 4 *E. D. Smith*, 251; 4 *Bosw.* 140; *Id.* 225; 11 *N. Y.* 416; 6 *Id.* 233; 7 *Id.* 266; 24 *Harc.* 173; *Id.* 236; 30 *Barb.* 246; 8 *Bosw.* 357; 44 *Barb.* 42; 38 *Id.* 445; 25 *N. Y.* 315; 26 *N. Y.* 460).

Re-hearing of appeal.

A re-hearing will not be granted where it is apparent no advantage can result from it (2 *Abb.* 259); nor because the counsel was not prepared to argue the case, and fears the court did not therefore fully understand the questions involved (2 *Hilt.* 135).

Respondent must appear.

On an appeal taken from a justice's judgment, the appellate court will *reverse* the judgment, if the respondent does not appear to argue the appeal (*Whitney v. Bayard*, 2 *Sandf.* 634; *Geraghty v. Malone*, 1 *Id.* 734; S. C. 1 *Code R.* 94. See, however, *Bellony v. Alexander*, 1 *Sandf.* 734; S. C. 1 *Code R.* 64, *sub nom.* *Bellamy v. Alexander*).

Judgment, how given.

Code, part of § 366. Upon the hearing of the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the justice, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial before the same or any other justice in the same

county, at such time and place, and on such terms as the court may deem proper. Where a new trial shall be ordered before a justice, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served.

The balance of this section relates to new trials in the county court, and is inapplicable to summary proceedings, and is, therefore, omitted.

Judgment roll.

Code, § 367. To every judgment upon appeal there shall be annexed the return upon which it was heard, or a certified copy thereof, the notice of appeal, with any offer, verdict, decision of the court, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgment, which shall be filed with the clerk of the court, and shall constitute the judgment roll.

Costs, how awarded.

Code, § 368. If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

Ordering restitution.

Code, § 369. If the judgment below, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment. The order may be obtained on proof of the facts made at or after the hearing, upon a previous notice of six days, and, if the order shall be made before the judgment is entered, the amount may be included in the judgment.

Where the appellant succeeds on the appeal, and a judgment of reversal is entered generally, without any award of a new trial in the

court below, the statute is imperative that the County Court shall order restitution of all that the appellant has lost (*Estus v. Baldwin*, 9 *How.* 80; *Jacks v. Darrin*, 1 *Abb.* 232). In such a case, there will not be a complete restitution, unless the appellant is allowed the costs of defending the action before the justice, and of prosecuting his appeal in the county court (*Id.*). If the return of the justice shows that the judgment has been paid, this will be sufficient proof of the fact, and the appellate court will order restitution as a part of the judgment, which may be collected by execution, in the usual manner, with costs (*Jacks v. Darrin*, 1 *Abb.* 232; *Kennedy v. O'Brien*, 2 *E. D. Smith*, 41; *Sheridan v. Mann*, 5 *How.* 201; *S. C. 3 Code R.* 213). So, where it appears from a transcript of the docket of the justice that the judgment has been paid, the appellate court, upon a reversal of the judgment, will order restitution (*Hunt v. Westervelt*, 4 *E. D. Smith*, 225).

On a motion for restitution the order becomes part of the judgment, and can be collected on execution with the costs (2 *E. D. Smith*, 41).

Setting off costs, and recovery.

Code, § 370. If upon an appeal a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

Costs on appeal ; appellant to state in his notice of appeal wherein the judgment shall be more favorable.

Code, § 371. Costs shall be allowed to the prevailing party in judgments rendered on appeal in all cases, with the following exceptions and limitations: In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. If he claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount. Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may, thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who shall

thereupon make a minute thereof in his docket, and correct such judgment accordingly, and the same so corrected shall stand as his judgment, and be enforced accordingly ; and any execution which has been issued upon the judgment appealed from, shall be amended by the justice to correspond with the amended judgment ; and no undertaking given to stay execution shall be enforced for more than the amount of the corrected judgment. If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs ; provided, however, that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal, or be made more favorable to him, to the amount of at least ten dollars. If the offer be made, and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs in the court below. But the appellant shall not recover costs except as provided in this chapter. The respondent shall be entitled to recover costs where the appellant is not.

Whenever costs are awarded to the appellant, he shall be allowed to tax as part thereof the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the costs in the appellate court ; and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance.

Amount of costs.

The costs shall be as follows :

To the appellant, on reversal, fifteen dollars.

To the respondent, on the affirmance, twelve dollars.

If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding ten dollars. If the appeal be dismissed for want of prosecution, as provided by section three hundred and sixty-four, no costs shall be allowed to either party. In every appeal the justice of the peace before whom the judgment appealed from was rendered, shall receive two dollars for his return. If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court. If in the notice of appeal the appellant shall not state in what particular or particulars the judgment should have been more favorable to him, he shall not be entitled to costs unless the judgment appealed from be wholly reversed.

A portion of this section relates to costs in new trials in the County Court, and being inapplicable to summary proceedings, it was on that account omitted.

Certiorari, or appeal by one not a party.

Summary proceedings can not be reversed on certiorari, brought by one not a party to the proceedings, though dispossessed under the warrant, where by the record the proceedings appear to have been regular, and the only grounds of irregularity appear by extrinsic facts alleged in his affidavit on the application for the certiorari (*Starkweather v. Seeley*, 45 *Barb.* 164). If, however, a husband is in fact the tenant of premises, and has been removed from the possession by summary proceedings under the statute, instituted against the wife for non-payment of rent, the husband is alone entitled to judgment of restitution; and he alone should be the relator in a certiorari to review and reverse the proceedings and judgment, for the court can not award restitution in favor of the wife or other person not a party to the proceedings (*The People ex rel. Lawson v. McCaffrey*, 42 *Barb.* 580).

CHAPTER XXXVII.

SQUATTER ACT.

- I. The act.
- II. Forms thereunder.

I.

The act.

Chapter 396.

An act to punish nuisances, and malicious trespasses on lands.

Passed April 13th, 1857.

The people of the State of New York, represented in senate and assembly, do enact as follows :

Trespassers on lands. Penalty therefor.

§ 1. Any person who shall hereafter intrude or squat upon any lot or piece of land situated within the bounds of any incorporated city or village without license or authority from the owner thereof, or who shall place thereon any hut, hovel, shanty, or other structure, without such license or authority, or who shall place, erect, or occupy within the bounds of any street or avenue of such city or village, any hut, hovel, shanty, or other structure, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Serving of notices.

§ 2. The owner of any lot or piece of land within

the bounds of any incorporated city or village, may give notice to any intruder or squatter who may have heretofore intruded or squatted thereon, or who shall have succeeded to any other intruder or squatter thereon, to quit the same on a day to be specified, which shall not be less than ten days thereafter ; which notice may be left upon the premises, addressed to the occupant or occupants thereof, without specifying their names ; and in case such intruder or squatter shall not quit the said premises at or before the expiration of the time specified in such notice, he and they shall be deemed guilty of a misdemeanor, and upon conviction may be punished by fine or imprisonment or both, in the manner and to the extent provided in the preceding section.

Removal of nuisances.

§ 3. The owner of said lot or piece of land upon which any hut, hovel, shanty, or other structure shall or may have been placed without his previous license or authority, may cause the same to be removed and abated, and the intruders or squatters thereon to be removed from the said lot or piece of land at any time after the expiration of the ten days, or other time specified in the notice in the next preceding section mentioned.

II.

Forms under said act.

1. Notice to quit under squatter act.
2. Complaint against Squatter.
3. Warrant against Squatter.

1. Form of notice to quit, under Squatter Act.

v.	Owner,
Occupant.	

Please to take notice, that I am the owner of the lot or piece of

land, situate [here insert description of premises] in the city of New York, upon which you have intruded and squatted, and that I require you to quit the same on the day of 187 , pursuant to the statute entitled "An act to punish nuisances and malicious trespasses on land" (Laws 1857, chap. 396), and fail not, under the pains and penalties of the law.

Dated New York,

187

Owner.

To

the occupant of said premises. }

2. Complaint against squatter.

State of New York, city and county of New York, ss.

John Doe, of the said city and county, complains of Richard Roe, of the same place, and for cause of complaint, the said John Doe, after being first duly sworn according to law, under oath, says, that he is the owner in fee simple of the lot and premises in said city and county, described as follows, to wit: (Here describe premises) and that the said Richard Roe did, contrary to the act of the legislature of the state of New York, entitled, "An act to punish nuisances and malicious trespasses on lands," passed April 13, 1857 (chap. 396), intrude and squat upon the said lot and piece of land aforesaid (the same being within the limits of an incorporated city), without license, or authority from the owner thereof, and that the said Richard Roe did, in further violation of said act, place upon said lot and piece of land, a shanty [or other structure] without license or authority from the owner of said lot and piece of land, and still continues said shanty upon said lot and piece of land, without any lawful license or authority, and in violation of law.—That on the day of , 187 , this deponent, as such owner aforesaid, caused a notice to be served upon the said Richard Roe, of which the annexed is a copy, wherein and whereby the said Richard Roe was required to quit the said lot and piece of land, on the day of 187 (ten days' notice), pursuant to the provisions of said statute, and that notwithstanding said notice, the said Richard Roe still continues in possession of said lot and piece of land, without any legal authority, and in violation of law.

The said John Doe, therefore, prays that the said Richard Roe may be apprehended, and proceeded with according to law.

JOHN DOE.

Sworn to, &c.* }

3. Warrant against squatter.

State of New York, city and county of New York., ss.

To any of the policemen of the city of New York, or to any marshal of said city, Greeting:

Whereas, complaint has this day been made by John Doe, of said city and county, on oath, before me, , Justice of , that he, the said John Doe, is the owner in fee

* To be sworn to before the magistrate.

simple of the lot and premises in said city and county, described as follows, to wit: (Here describe premises) and that Richard Roe of said city and county, did, contrary to the act of the legislature of the state of New York, entitled "An act to punish nuisances and malicious trespasses on lands," passed April 13, 1857 (chap. 396), intrude and squat upon the said lot and piece of land aforesaid (the same being within the limits of an incorporated city), without license or authority, from the owner thereof, and that said Richard Roe did, in further violation of said act, place upon said lot or piece of land, a shanty or other structure, without license or authority from the owner of said lot and piece of land, and still continues said shanty upon said lot and piece of land, without any lawful authority, and in violation of law. That on the day of 187, said John Doe, as such owner aforesaid, caused a notice to be served upon the said Richard Roe, wherein and whereby the said Richard Roe was required to quit the said lot and piece of land, on the day of , 187, pursuant to the provisions of said statute; and that, notwithstanding said notice, the said Richard Roe still continues in possession of said lot and piece of land, without any legal authority, and in violation of law.—You are, therefore, commanded forthwith to take the said Richard Roe, and bring him before me, the said justice, at my court room, No. street, in the city of New York, for examination upon said complaint, under said statute, and to be dealt with according to law.

Witness my hand and seal, at the said city and county aforesaid, this day of , 187.

To be signed by the justice, [L. s.]

With his name and title of office.

If, upon the prisoner's examination, sufficient evidence is produced to justify the holding of the prisoner, he should be committed for trial before the appropriate tribunal, and if convicted upon the trial, the usual record of such conviction is to be made and signed.

CHAPTER XXXVIII.

LIABILITIES INCIDENTAL TO REMEDIES.

- I. Liability of justice and of landlord, in cases in which the justice had no jurisdiction.
- II. Liability of landlord to action for damages in cases in which the adjudication in summary proceedings is reversed upon certiorari.

I.

In cases in which the justice had no jurisdiction.

It is a general principle that the jurisdiction of all courts and officers may be questioned whenever the proceedings or decision of such courts or officers are made the foundation of any claim (*Broadhead v. McConnell*, 3 *Barb.* at p. 183, citing *Borden v. Fitch*, 15 *Johns. Rep.* 141 ; *THOMPSON, C. J.*, *Mills v. Martin*, 19 *Id.* 33 *SPENCER, Ch. J.* ; *Latham v. Edgerton*, 9 *Cow. Rep.* 227, *SUTHERLAND, J.*, and the other cases referred to in *Cowen & Hill's Notes to Phil. Ev.* p. 801, note 551, and *Clinton, Senator*, in *Yates v. Lansing*, 9 *John. Rep.* 431 to 437). This principle applies to all courts, whether of general or special jurisdiction, and to all questions of jurisdiction, whether over the subject-matter or over the parties. There is, however, a practical difference between the modes of raising the question of jurisdiction, dependent upon the character of the court, whether it be a court of general or special jurisdiction. The authority of courts of general jurisdiction, both over the subject-matter of the suit and the parties, is always presumed, and those who deny it must take upon themselves the burden of overturning this presumption ; while nothing is presumed

in favor of courts or officers of special jurisdiction, those who claim a right under their proceedings or decisions, must show the authority to make them. If the court has no authority to make the decision, the decision has no efficacy whatsoever, and is entitled to no legal respect or recognition. So that the jurisdiction of the court making the decision is always a proposition embraced in the above general rule (*Broadhead v. McConnell, supra*). The court of appeals in the recent case of *The People v. Wm. M. Tweed* (not yet reported), in sustaining 'these same principles (per ALLEN, J.), said: "It is no new feature in the law that inferior magistrates may, when thereunto called, sit in judgment upon the jurisdiction of the highest courts, when their process or judgment comes collaterally before them. Trespass will lie for property seized, or for the imprisonment of a person by virtue of the judgment of the highest court of the state, if it has not jurisdiction of the person, or to give the judgment; and a justice of the peace must pass upon the jurisdiction, if the action chances to be before him for trial. It matters not what the general powers and jurisdiction of a court may be, if it act without authority in the particular case, its judgments and orders are mere nullities,—not voidable, but simply void,—protecting no one acting under them, and constituting no hindrance to the prosecution of any right. The distinction between courts of limited and of general jurisdiction is this, that when their acts and judgments are relied upon, either as giving a right or furnishing a defense, the latter is presumed, while that of the former must be proved."

The rule is that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority and power given by the statute. They take nothing by implication, and must show the power given them, under which they act, in every instance; but when jurisdiction has been ac-

quired, courts are to be liberal in construing their proceedings as respects regularity and form. If the justice have jurisdiction, and merely errs in its exercise, he is not liable to an action for the consequences, for the act is voidable only, and can be taken advantage of only on appeal, for, having jurisdiction, he is not liable for errors committed in its legitimate exercise. This freedom from action and suit is given to judges, not so much for their own sake as for the sake of the public and for the advancement of justice, "that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice," observes LORD TENTERDEN, "ought to be."

But if the justice act without jurisdiction, or if he transcend his powers, his proceedings will be absolutely void, and he will be liable to an action at the suit of the aggrieved party for all damages sustained thereby. If he proceeds in a cause—*e. g.*, by issuing a warrant of restitution in proceedings for forcible entry and detainer—after his power is taken away by *certiorari*, he becomes a trespasser (*Case v. Shepherd*, 2 *John. Cas.* 27). So, too, if he issues a dispossessing warrant on an affidavit which does not show the conventional relation of landlord and tenant (*Evertson v. Sutton*, 5 *Wend.* 281); and in *Vosburgh v. Welch* (11 *Johns.* 175), it was held that if a justice of the peace issues an attachment against the property of a person as an absent debtor, without any proof *on oath*, before him, of absence or concealment of the debtor, he is liable as a trespasser, and that *satisfactory proof*, as required by the act, means legal evidence, or such as would be received in the ordinary course of judicial proceedings (see also *Tallman v. Bigelow*, 10 *Wend.* 421; *Kerr v. Mount*, 28 *N. Y.* 659); and in *Miller v. Brinkerhoff* (4 *Den.* 118), it was held that where certain facts are required to be proved to warrant the issuing of process in a court of special and limited jurisdiction, if there be a total defect of proof as to any essential point the process will be void.

But where the proof, though slight and inconclusive, legally tends to establish all the essential facts, the process will be valid when questioned collaterally, and can only be avoided by a direct proceeding to set it aside.

By the common law, the regularity of the proceedings under a summary conviction may be questioned in a collateral action. The following case, in which the subject was examined, affords a rule, by which to determine what acts done under a limited jurisdiction can be made the subject of a civil action. In an action of trover for goods, levied by warrant of the commissioners of excise, the question was, —if they adjudge low wines to be strong wines, perfectly made, upon the statute, 12 *Car.* 2, c. 23, whether it may be drawn in question again by an action, so as to make the officer chargeable? For the affirmative, the case of a justice of the peace was relied upon; in which it was held, that an officer was liable to an action for taking a distress pursuant to his warrant, in case of a rate made upon one who was not liable (*vide Cro. Car.* 395, and *Dyer*, 135). On the contrary, it was insisted, that, the statute having given an appeal, the party had no other remedy; and that, the commissioners being made judges by the statute, no action lay against them, if they had erred, in a matter of fact. The court decided unanimously, that the action was maintainable, *HALE*, Ch. B.—“First, the matter is not within their jurisdiction, which is a stinted limited jurisdiction; and implies a negative, viz., that they shall not proceed at all in other cases. But if they should commit a mistake in a thing that were within their power, that would not be examinable here. It is to be considered, that special jurisdictions may be circumscribed: 1. With respect to place, as a leet or corporation. 2. With respect to persons. 3. With respect to the subject-matter of their jurisdiction: and here the statute limits their jurisdiction in all these three respects; and, therefore, if they

give judgment in a cause arising in another place, or in other matters, all is void and *coram non judice*,—as if they should adjudge rose-water to be strong water; and here low wines are waters of the first extraction. And though the information before them supposes the matter to be within their power and jurisdiction, yet the party is not thereby concluded, but he may aver the contrary.” And the chief Baron held, against the opinion of Baron RAINSFORD, “that it would have been against the defendants, even though they had pleaded specially. But it would be otherwise in the case of a brewer or retailer, who are expressly comprised in the act,—as if the commissioners should adjudge small beer to be strong; for they have a jurisdiction there, and an appeal lies from their sentence. But where they have no power over the thing, as here they have not, the case is altered.” Judgment was given for the plaintiff (*Terry v. Huntington*, *Hardr.* 480). This doctrine is recognized with the same distinction by Lord HOLT (*Fullers v. Fotch*, *Holt*, 287; *Carth.* 346), and is confirmed by subsequent authorities (*Cowp.* 240; 8 *East.* 404; 1 *Burr.* 595; 2 *Bl. Rep.* 1146).

It is however established, that in an action of trespass brought against a magistrate, a subsisting conviction,—good upon the face of it, in a case to which his jurisdiction extends,—being produced at the trial, is a bar to the action, provided the execution also has been regular; although the magistrate may have formed an erroneous judgment upon the facts; for that is properly the subject of appeal; and, therefore, in cases where an appeal lies, no action can be maintained till the merits have been heard, and the conviction quashed thereupon (*Fullers v. Fotch*, *Holt*, 287, and *Strickland v. Ward*, 7 *T. R.* 631, *infra*, and see 2 *B. & P.* 391; *Massey v. Johnson*, 12 *East*, 81, 82; see also 16 *East*, 21, per Lord ELLENBOROUGH).

In an action of trespass against two magistrates, for

giving the plaintiff's landlord possession of a farm as a deserted farm, under 11 Geo. 2, c. 19, s. 16, where the defendants produced in evidence a record of their proceedings under that act, which set forth all such circumstances as were necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute; it was held, that this was conclusive as an answer to the action. On that occasion, ABBOT, C. J. said: "It is a general rule and principle of law, that where justices of the peace have an authority given to them by an act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act done (*Basten v. Carew*, 3 *B. & C.* 649; 5 *Dowl. & Ry.* 558; 2 *Dowl & Ry. Mag. Ca.* 563; see *Doswell v. Impey*, 2 *Dowl & Ry.* 350; 1 *B. & C.* 163). But in cases where the want of jurisdiction appears upon the papers or by the conviction itself, an action may be supported before the conviction is reversed or quashed. If, however, the subject-matter be one over which the magistrate has a general jurisdiction, evidence exterior to the conviction is not admissible to prove that in a particular case the magistrate drew an erroneous conclusion.

II.

Liability of landlord to action for damages in cases in which the adjudication in summary proceedings is reversed upon certiorari.

The statute affirmatively affixes a liability upon the landlord for damages in cases in which the adjudication is reversed by the Supreme Court, by the provision providing that "if the proceedings shall be reversed

or quashed by the Supreme Court, the tenant or lessee may recover against the person making application for such removal, any damages he may have sustained by reason of such proceedings, with costs, in an action on the case (*vide*, § 49 of the stat., *ante*, p. 194), and effect was given to this provision by the commission of appeals in *Hayden v. The Florence Sewing-machine Company* (54 *N. Y.* 221).

Restitution in summary proceedings.

By § 48 of the statute (*vide*, p. 194), the Supreme Court may, in the reversal of proceedings, award restitution to the party injured, with costs, and may make such orders and rules, and issue such process, as may be necessary to carry their judgment into effect. But the court will not award restitution to the tenant, if the term has expired before the judgment of reversal is rendered (*Cretien v. Doney*, 1 *N. Y.* 419), and as to costs, *vide ante*, p. 319.

Restitution in proceedings of forcible entry and detainer.

As to restitution in these proceedings (*vide* §§ 22, 23, *ante*, p. 181), and as to costs (*vide ante*, p. 315).

CHAPTER XXXIX.

CHAPTER OF FORMS.

- I. Subpœna.
- II. Proof of service.
- III. Order for attachment against witness.
- IV. Attachment against witness.
- V. Complaint in ordinary civil action against tenant for rent.
- VI. Complaint in ordinary civil action against surety of tenant for rent.
- VII. Lease, with covenants.
- VIII. Other covenants for lease.
- IX. Security for rent.
- X. Assignment of lease.
- XI. Mortgage on lease, interest, and insurance clause.
- XII. Bond to accompany same. Interest clause.
- XII. Party wall agreement.
- XIV. Permission to insert beams in adjoining house.
- XV. Builder's contract.
- XVI. Different forms of acknowledgment.

I.

Subpæna.

State of New York, city and county of New York, ss.
The People of the state of New York, to John Smith and John Jones,
Greeting:

We command you, and each of you, that, all business and excuses being laid aside, you, and each of you, do appear, in your proper persons, before Denis Quinn, Justice of the District Court of the city of New York, for the first Judicial District, at the court room southwest corner of Chambers and Centre streets, in the city of New York, on _____ day, the _____ day of _____ 187____, at ten o'clock in the forenoon of the said day, then and there to testify those things which you or either of you know, in a certain proceeding now pending before said justice, between John Doe, landlord, and Richard Roe, tenant, on the part of the landlord. And this

IV.

Attachment against witness.

The People of the state of New York, to any marshal of the city of New York, Greeting:

We command you to attach John Smith, if he may be found in said city, and bring him [forthwith, or] on the day of 187 , at 10 A. M., before me, the Justice of the District Court, of the city of New York, for the First Judicial District, at the court room, southwest corner of Chambers and Centre streets, in said city, to answer for a certain alleged contempt in not obeying the writ of subpœna, commanding him to appear this day before me, as such justice, to testify and give evidence in a certain proceeding then to be tried between John Doe as landlord, and Richard Roe as tenant, on the part of the landlord, and you are further commanded to detain him in your custody, until he shall be discharged by me, and have you then and there this writ.

Witness the hand of the said justice, at the said city, this day of A. D. 187 .

DENIS QUINN,
Justice, &c.

(Seal of court.)

Duty and punishment of witness.

A witness duly subpoenaed to attend court, is bound to make extraordinary efforts to obey the writ; nothing but extreme poverty and utter inability to attend, or sickness of himself or family, conclusively proved, will excuse his non-attendance. Unless the contempt is purged, the witness will be fined, not only the costs of the attachment, but to the full amount of the costs of the term incurred by the party who subpoenaed him, if the trial was put off in consequence of his non-attendance (15 *Wend.* 602; *Burrill's Practice*, vol. 1, page 452).

V.

Complaint in ordinary civil action against tenant for rent.

Court	New York.
v.	Plaintiff,
	Defendant.
	Complaint for rent against tenant.

The complaint of the plaintiff against the defendant shows to

this court, that the plaintiff, as landlord, by agreement in writing, bearing date on the day of - 187 , executed by him as landlord and by the defendant, as tenant, the said plaintiff let and rented unto the said defendant as tenant, the premises known as No. in the city of New York, for the term of years from 187 , at the yearly rent, or sum of dollars, payable monthly in advance, which the said defendant, in and by said lease, agreed to pay.

2. That on the _____ day of _____ 187 , there became,
and was due, under said lease, the sum of _____ dollars, for
rent from _____ 187 to _____ 187 , which
he promised to pay, but has not.

3. That by means of the said several premises a cause of action hath accrued to the plaintiff against the said defendant to have and to recover the indebtedness aforesaid.

Wherefore the plaintiff demands judgment against the defendant for said sum of \$ _____, and interest from 187, together with costs.

Plaintiff's Attorney,
No. street.

City and county of New York, ss.

being duly sworn, says that he is the plaintiff in this action, and that the foregoing complaint is true to the knowledge of this deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

Sworn to, before me this
day of 187 .

Notary Public, New York city.

VI.

*Complaint in ordinary civil action against surety
of tenant for rent.*

Court New York.

<p><i>v.</i> Plaintiff,</p> <p> Defendant.</p>	<p>Complaint for rent against surety.</p>
---	---

The complaint of the plaintiff against the defendant shows to this court that the plaintiff, as landlord, by agreement in writing, bearing date on the _____ day of _____, 187____, executed by him as landlord, and by _____, as tenant, the said plaintiff let and rented unto the said tenant, the premises known as No. _____, in the city of New York, from the term of _____ years, from _____, 187____, at the yearly rent, or sum of _____ dollars, payable monthly in advance, which the said tenant in and by said lease agreed to pay.

2. That on the day of , 187 , there became, and was due, under said lease, the sum of dollars, for rent from , 187 , to , 187 , which the said tenant promised to pay, but did not, of which the defendant was duly notified.

3. That the said defendant in consideration of the said letting, did by an instrument in writing, under seal, bearing even date with said lease, and duly executed by him, covenant and agree to and with the said plaintiff that if default should be made by the said tenant in the payment of the rent or performance of the covenants in said lease contained on the part of the said tenant, he, the said defendant, would well and truly pay the said rent and all arrears thereof, and also all damages that might arise in consequence of such non-performance, without requiring notice of such default.

4. That by means of the said several premises a cause of action hath accrued to the plaintiff against the said defendant to have and to recover the indebtedness aforesaid.

Wherefore the plaintiff demands judgment against the defendant for said sum of dollars, and interest, from 187 , together with costs.

Plaintiff's attorney,
No. street.

City and county of New York, ss.

 , being duly sworn, says that he is the plaintiff in this action, and that the foregoing complaint is true to the knowledge of this deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

Sworn to before me this day of }
187 .

Notary Public, New York city.

VII.

Lease, with covenants.

This indenture, made the day of 187 , between of the city of New York, party of the first part, and of the same place, party of the second part, witnesseth, That the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said party of the second part the premises known as No. street, in the city of New York, with the appurtenances, for the term of years from the day of one thousand eight hundred and , at the yearly rent or sum of to be paid in equal monthly payments in advance on the first day of each and every month during said term. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom. And the said party of the second part hereby covenants to pay to the said party of the

first part, the said yearly rent as herein specified. And also, to pay the regular annual rent or charge, which is or may be assessed or imposed according to law, upon the said premises, for the croton water, on or before the 1st day of August in each year during the term; and if not so paid, the same shall be added to the rent then due. And the said party of the second part further covenants that he will not assign this lease, nor any interest therein or let nor underlet the whole or any part of the said premises, nor make any alterations therein, without the written consent of the said party of the first part, under the penalty of forfeiture and damages: and that he will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra-hazardous on account of fire or otherwise without the like consent under the like penalty. And the said party of the second part, further covenants that he will permit the said party of the first part, or his agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, will permit the usual notice of "to let," or "for sale" to be placed upon the walls or doors of said premises, and remain thereon without hinderance or molestation.

And at the expiration of the said term, the said party of the second part, will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And the said party of the first part, doth covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid. And it is further understood and agreed, that the covenants and agreements, contained in the within lease, are binding on the parties hereto and their legal representatives.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

[L. s.
[L. s.

Sealed and delivered in the presence of }

VIII.

Other covenants for lease.

1. Covenant for renewal.
2. Covenant for repairs.
3. Covenant to pay taxes and assessments.
4. Covenant for performance of the requirements of municipal Boards.

1. Covenant for renewal.

"And the said party of the first part, for and in consideration of the premises, hereby promises and agrees, to and with the said party of the second part, to make and execute unto him a new lease, similar in all respects to this, and to run for the same period of years,

of the premises aforesaid, upon receiving from the party of the second part a notice in writing claiming such renewal, at any time within three months prior to the expiration of the term granted by these presents."

2. Covenant for repairs.

“ And the said party of the first part, for and in consideration of the premises, hereby promises and agrees, to and with the said party of the second part, to put and keep the said premises in good tenantable order and repair, at his own cost and expense, during the whole of the term hereby demised.”

3. Covenant to pay taxes and assessments.

"And the said party of the second part hereby covenants to bear, pay, and discharge all such taxes, duties, and assessments, whatsoever, as shall or may, during the said term hereby granted, be charged, assessed, or imposed upon the said demised premises."

4. Covenant for performance of the requirements of municipal Boards.

"And the said party of the second part hereby covenants to respect and fully perform all the ordinances and requirements of the Board of Health, and of all other local and municipal authorities, and to protect and save the said party of the first part harmless therefrom."

IX.

Security for rent to be endorsed on lease.

In consideration of the letting of the premises within mentioned to the within named _____ and the sum of one dollar to me paid by the said party of the first part, I, _____ do hereby covenant and agree, to and with the party of the first part above named, and his legal representatives, that if default shall at any time be made by the said _____ in the payment of the the rent or performance of the covenants contained in the within lease on his part to be paid and performed, that I, _____ will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said party of the first part.

Witness my hand and seal this day of in the
year 187 .

Witness,

}

[L. S.]

Effect of surrender, on sureties for rent.

The surrender of a term, does not operate to discharge the tenant or his sureties from rent already accrued and payable, and a reletting of the demised premises, by the direction of the surety for the payment of the rent, for the account and benefit of the surety, after the tenant has failed and abandoned the premises, does not operate as a surrender, so as to discharge the surety from further liability (*McKensie v. Farrell*, 4 *Bosw.* 192).

X.

Assignment of lease.

Know all men by these presents, that I, _____ of the city of New York, for and in consideration of the sum of _____ lawful money of the United States, to me duly paid, by _____ of the same place, have sold, and by these presents do grant, convey, assign, transfer, and set over, unto the said _____ a certain indenture of lease, bearing date the _____ day of _____ in the year 187 , made by _____ to _____ of premises known as No. _____ street, in the city of New York, and recorded in the office of the Register of the city and county of New York, on the _____ day of _____ 187 , in Liber _____ of conveyances, p. _____ with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances. To have and to hold the same unto the said _____ and his assigns, from the _____ day of _____ 187 , for and during all the rest, residue, and remainder yet to come of and in the term of _____ years mentioned in the said indenture of lease, subject, nevertheless, to the rents, covenants, conditions, and provisions therein also mentioned. And I do hereby covenant, grant, promise, and agree, to and with the said _____ that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments, and incumbrances whatsoever.

In witness thereof, I have hereunto set my hand and seal this _____ day of _____ 187 .

Sealed and delivered in the presence of }

[L. S.]

XI.

Mortgage on lease.—Interest and insurance clause.

This Indenture, made the day of in the year 187 , between John Doe of the city of New York, party of the first part, and Richard Roe of the same place, party of the second part. Whereas, John Brown did, by a certain indenture of lease, bearing date the day of in the year 187 , demise, lease, and to farm let, unto said John Doe, and to his executors, administrators and assigns, all and singular, the premises hereinafter mentioned and described, together with their appurtenances: To have and to hold the same unto the said John Doe, and to his executors, administrators and assigns, for and during, and until the full end and term of twenty-one years, from the first day of May, A. D. 1775, and fully to be complete and ended, yielding and paying therefor unto the said John Brown, and to his executors, administrators, or assigns, the yearly rent or sum of dollars, payable quarterly in advance, on the first days of May, August, November, and February in each and every year during the said term, and which said lease was duly recorded in the office of the Register of the city and county of New York, on the first day of May, 1875, in Liber 1000 of conveyances, p. 100. And whereas, the said party of the first part is justly indebted to the said party of the second part, in the sum of one thousand dollars, lawful money of the United States of America, secured to be paid by his certain bond of obligation bearing even date with these presents, in the penal sum of two thousand dollars, lawful money as aforesaid, conditioned for the payment of the said first-mentioned sum of one thousand dollars, on the day of , which will be in the year 187 , and the interest thereon to be computed from the date thereof, at and after the rate of seven per cent. per annum, and to be paid half-yearly, which said bond also contains an agreement, that should any default be made in the payment of the said interest or any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of thirty days, that then, and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid principal sum of with all the arrearages of interest thereon, shall, at the option of the said party of the second part, or his legal representatives, become and be due and payable immediately thereafter, although the time limited for the payment thereof may not then have expired; anything in the said bond contained to the contrary thereof notwithstanding, as by the said bond or obligation and the condition thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred,

and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, all that certain lot, piece, or parcel of land situate, lying, and being in the ward, of the city of New York, bounded and described as follows: (Here insert the description by metes and bounds) and which said premises are also known, and by the street, No. street, in said city. Together with all and singular the edifices, buildings, rights, members, privileges and appurtenances thereunto belonging, or in any wise appertaining. And also all the estate, right, title, interest, term of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said demised premises, and every part and parcel thereof, with the appurtenances; and also, the said indenture of lease, and every clause, article and condition therein expressed and contained; to have and to hold the said indenture of lease, and other hereby granted premises, unto the said party of the second part, his executors, administrators and assigns, to his and their only proper use, benefit and behoof, for and during all the rest, residue, and remainder of the said term of years yet to come and unexpired: subject, nevertheless, to the rents, covenants, conditions and provisions in the said indenture of lease mentioned. Provided always, and these presents are upon this express condition, that if the said party of the first part, shall well and truly pay unto the said party of the second part, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then and from thenceforth, these presents and the estate hereby granted, shall cease, determine, and be utterly null and void, anything herein before contained to the contrary in any wise notwithstanding. And the said party of the first part doth hereby covenant, grant, promise and agree to and with the said party of the second part, that he shall well and truly pay unto the said party of the second part, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, according to the condition of the said bond or obligation. And that the said premises hereby conveyed, now are free and clear of all incumbrances whatsoever, and that he hath good right and lawful authority to convey the same in manner and form hereby conveyed. And if default shall be made in the payment of the said sum of money above mentioned, or in the interest which shall accrue thereon, or of any part of either, that then and from thenceforth it shall be lawful for the said party of the second part, and his assigns, to sell transfer, and set over, all the rest, residue and remainder of the said term of years then yet to come, and all other the right, title, and interest of the said party of the first part, of, in and to the same, at public auction, according to the act in such case made and provided: And as the attorney of the said party of the first part for that purpose by these presents duly authorized, constituted and appointed, to make, seal, execute and deliver to the purchaser or purchasers thereof, a good and sufficient assignment, transfer, or other conveyance in the law for the same premises, with the appurtenances, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the same premises,

rendering the overplus of the purchase money (if any there shall be), unto the said party of the first part, or his assigns, which sale, so to be made, shall be a perpetual bar, both in law and equity, against the said party of the first part, and against all persons claiming or to claim the premises, or any part thereof, by, from, or under him, them or any of them. And it is also agreed by and between the parties to these presents, that the said party of the first part, shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss and damage by fire, by insurers, and in an amount approved by the said party of the second part, and assign the policy and certificates thereof to the said party of the second part, and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand, with interest at the rate of seven per cent. per annum.

In witness whereof, the party of the first part to these presents hath hereunto set his hand and seal, the day and year first above written.

JOHN DOE. [L. s.]

Sealed and delivered in the presence of }
JOHN PETERSON. }

XII.

Bond to accompany foregoing mortgage—interest condition.

Know all men by these presents, that I John Doe, of the city of New York, am held and firmly bound unto Richard Roe, of the same place in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said Richard Roe, his executors, administrators or assigns: for which payment well and truly to be made, I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal dated the day of 187 .

The condition of the obligation is such, that if the above bounden John Doe, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named Richard Roe, his executors, administrators, or assigns, the just and full sum of one thousand dollars, on the day of which will be in the year 187 , and the interest thereon, to be computed from the date hereof, at and after the rate of seven per cent. per annum, and to be paid half yearly, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or any part thereof, on any day whereon the same is made payable as above expressed, and should the same remain unpaid and in arrear for the space of thirty days, then and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid principal sum of one thousand dollars with all arrearage of interest thereon, shall, at the option of the said Richard Roe

or his legal representatives become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, any thing herein before contained to the contrary thereof in any wise notwithstanding.

JOHN DOE. [L. s.]

Sealed and delivered in the presence of {
JOHN PETERSON. }

XIII.

Party wall agreement.

This agreement made the _____ day of _____ 187 ,
between John Doe of the city, county, and state of New York of the
first part, and Richard Roe of the same place, party of the second
part, witnesseth:

That whereas the said John Doe is the owner of the house and lot
known as No. _____ street in the said city of New York,
and the said Richard Roe is the owner of the lot adjoining the same,
on the northerly side thereof, on which last mentioned lot the said
Richard Roe is about to erect a brick building; now, therefore, the
said John Doe, in consideration of the sum of \$ _____, to him
in hand paid, the receipt whereof is hereby acknowledged, doth for
himself, his heirs, executors, administrators, and assigns, covenant,
grant, promise, and agree to and with the said Richard Roe, his heirs,
executors, administrators and assigns, that he the said Richard Roe,
his heirs and assigns, shall and may, in the erection of the brick build-
ing about to be built, as aforesaid, freely and lawfully, but in a work-
manlike manner, make use of the northerly gable end wall of the said
John Doe's house, or so much thereof as the said Richard Roe, his
heirs or assigns may desire, as a party wall, to be continued and used
as such forever.

And the said John Doe and Richard Roe do hereby mutually cov-
enant and agree, for and with themselves, and their respective heirs
and assigns, that if it shall hereafter become necessary to repair or
rebuild the whole, or any portion of the said party wall, the expense
of such repairing or rebuilding shall be borne equally by the said
John Doe and Richard Roe, their respective heirs and assigns, as to
so much and such portion of the said wall as the said Richard Roe,
his heirs and assigns, shall or may use for the purpose aforesaid; and
that whenever the said party wall, or any portion thereof, shall be
rebuilt, it shall be erected on the same spot where it now stands, and
be of the same size, and the same or similar materials, and of like
quality, with the present wall.

It is further mutually understood and agreed between the afore-
said parties, that this agreement shall be perpetual, and at all times
be construed into a covenant running with the land; and that no
part of the fee of the soil upon which the wall of the said John Doe,
above described, now stands, shall pass to, or be vested in, the said
Richard Roe, his heirs and assigns, in or by these presents.

In witness whereof the said parties have hereunto set their hands
and seals the day and year aforesaid.

In presence of {

JOHN DOE. [L. s.]
RICHARD ROE. [L. s.]

Another form of party wall agreement.

This agreement made the day of 187 , between John Doe of the city, county, and state of New York, party of the first part, and Richard Roe of the same place, party of the second part, witnesseth:

That whereas the said John Doe is the owner of the lot of land known as No. street, in the city of New York, and the said Richard Roe is the owner of the lot adjoining the same on the northerly side thereof; and whereas the said John Doe is about to erect on his said lot a five-story brick building, fifty feet in height, and sixty feet in depth, the northerly division walls of which are to be of brick and sixteen inches thick, and the foundation wall of which is to be of stone twenty inches thick, and is to be put down fifteen feet below the curb.

Now, therefore, in consideration of the mutual covenants herein contained, and for the purpose of making the said northerly wall a party wall, the said parties have mutually agreed to and with each other as follows:

First. That the said wall shall be built by the said John Doe, in manner aforesaid, equally upon the land of each of the parties hereto.

Second. That the said Richard Roe will pay to the said John Doe at the time he makes use of the said party wall, one half of the expense of erecting the same, with the interest added.

Third. That in case there shall be any dispute as to the amount of such expense, and the parties hereto shall be unable to agree upon the amount thereof, the same shall be left to the arbitrament of John Jones, an indifferent person hereby chosen as arbiter to determine the same; and the award to be made by the said Jones is to be final and conclusive upon each of us, and the amount so determined is to be paid on demand.

Fourth. This agreement is to apply to and bind the parties hereto, and their respective heirs, grantees, and assigns, as a covenant running with the land.

In witness whereof, &c. [as in last form].

XIV.***Permission to insert beams in wall of the adjoining house.***

This agreement made this day of 187 , between Jonu Doe of the city, county, and state of New York, party of the first part, and Richard Roe of the same place, party of the second part, as follows:

Whereas the said John Doe is the owner of the house and lot known as No. street, in the said city of New York, and the said Richard Roe is the owner of the lot adjoining the same, on the northerly side thereof, on which last-mentioned lot the said Richard Roe is about to erect a brick building, and desires permission to in-

Provided, that in each of the said cases, a certificate shall be obtained and signed by the said architect, John Jones.

And it is hereby further agreed by and between the said parties:

First. The specifications and the drawings are intended to co-operate, so that any works exhibited in the drawings, and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications, without any extra charge whatsoever.

Second. The contractor, at his own proper cost and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models, and cartage of every description, for the due performance of the several erections.

Third. Should the owner, at any time during the progress of the said building, request any alteration, deviation, additions, or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

Fourth. Should the contractor at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by said architect, Jones, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons—one employed by the owner, and the other by the contractor—and those two shall have power to name an umpire whose decision shall be binding on all parties.

Sixth. The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

Seventh. [Here insert any other conditions.]

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year above written.

JOHN DOE. [L. s.]
RICHARD ROE. [L. s.]

In presence of }
JOHN BROWN. }

XVI.

*Forms of proof and acknowledgment of instruments. **

1. By one or more persons.
2. By subscribing witness.
3. By husband and wife.

1. By one or more persons.

State of New York, city and county of New York, ss.

I certify that on this day of
187 , before me personally appeared known to me
to be the individual described in, and who executed the foregoing
instrument, and acknowledged that he executed the same.

Notary Public, N. Y. Co.

2. By subscribing witness.

State of New York, city and county of New York, ss.

On this day of A. D. 187 , before me
personally came to me known to be the subscribing
witness to the foregoing instrument, who, being by me duly sworn,
did depose and say, that he resided in the city of New York; that he
knew the individual described in, and who executed
the foregoing instrument; that he was present, and saw [him or them]
execute the same; that [he or they] acknowledged the execution
thereof; whereupon he, the said affiant, became subscribing witness
thereto.

Notary Public N. Y. Co.

3. By husband and wife.

State of New York, city and county of New York, ss.

I certify that on this day of 187 , before
me personally appeared and his
wife, known to me to be the individuals described in, and who exe-
cuted the foregoing instrument, and severally acknowledged that they
executed the same; and the said on a private
examination by me made, separate and apart from her husband,
acknowledged to me that she executed the same freely, without any
fear or compulsion of or from her said husband.

Notary Public N. Y. Co.

* Of course the various forms must be made to suit the peculiar
circumstances of each particular case.

APPENDIX.

Party walls.

In the case of *Nash v. Kemp* (reported in the New York *Daily Register*, October 25th, 1875), tried before Judge VAN VORST, at the Special Term of the Supreme Court, and decided by him on the fourth of that month, it appeared that the plaintiff was the owner of a lot of land on the easterly side of Fifth Avenue, in the city of New York. Sarah A. Livermore, the defendant's grantor, was the owner of a lot adjoining the northerly line of the plaintiff's lot. The plaintiff being about to erect a building upon his land, entered into an agreement, in writing, with Sarah A. Livermore, in respect to the northerly wall of the building to be erected by him, in which it was agreed that the northerly wall of such building so to be erected, should be constructed partly upon the land of the plaintiff, and partly upon the land of Sarah A. Livermore; that is to say, two inches of the wall should be upon the land of the plaintiff, and fourteen inches thereof upon the land of Sarah A. Livermore, and should be a party wall between the building so to be erected by the plaintiff, and any building which might be erected upon the land of Sarah A. Livermore. The wall in question was to be built by the plaintiff, at his individual cost, in a substantial manner. He agreed to build it sixteen inches thick throughout its entire length and

height. It was to be seventy feet in length along the north side of the plaintiff's building, and to be at least four stories high. It was agreed that Sarah A. Livermore and her assigns might, without cost or expense to her or them, use "the party wall so to be constructed," whenever she or they should erect any building upon her land.

The plaintiff proceeded at once to erect his building, and completed the same, including the north wall in question.

The plaintiff built the front wall of his house at the same time with the northerly wall, except carrying the latter up one story ahead, the brick work of the two walls constituting, in fact, one structure, blocked and toothed in at their junction at the northwest corner of the building. The front wall was faced with brown stone. The ashlar was anchored to the brick wall behind, as that went up.

The brick work of the front wall, to which the ashlar was anchored, at its junction with the northerly wall, although toothed and blocked in, was further secured thereto, by means of anchors firmly imbedded in the brickwork, of which there are two in each story, about eight feet apart. These anchors run diagonally from about the centre of the northerly or party wall to the centre of the front wall. The object of this further security being to tie and hold the two walls more firmly together. The front wall of the plaintiff's house, exclusive of the ashlar, is about fifteen inches in thickness. The northerly or party wall was constructed of the agreed thickness up to a point ten inches from the line of the avenue, where, as to the north half of the wall, the same terminated. The south half, however, was continued, and interlaced with the front wall, as already observed, until within about four inches of the street line, leaving a space of four inches between it and the front line for the ashlar.

By this method of construction, there was a jog in

the northwest corner of the wall, ten inches in depth and eight inches in width, formed by the intersection of the face of the north half and the north line of the wall, as carried by the plaintiff towards the street line of the lots, in front. This jog was left by the plaintiff, extending from the foundation to the top of the wall, to be occupied by the owner of the adjoining lots in connecting his front with and supporting the same thereon. After the completion of the plaintiff's building, the defendant acquired title to the land of Sarah A. Livermore, and erected thereon a building known as the "Buckingham Hotel." When the defendant came to connect his front wall with the party wall, he complained to the plaintiff that he had occupied with his front wall, including the ashlar, more space of the party wall than he was justly entitled to.

The claim of the defendant being that, as to his front wall, the plaintiff was entitled to occupy or overlap the party wall to the extent of two inches only, and up to the northerly line of his lot, whereas he had covered the same with his front wall to its centre, and had in this manner appropriated to himself a frontage of six inches of the defendant's land lying in front of the party wall and up to the line of the avenue. The defendant commenced to cut away six inches of the plaintiff's ashlar, lying immediately south of the centre line of the party wall, when he was restrained by an injunction order obtained in this action, and the plaintiff, by his complaint and upon the trial, asks that it be adjudged that he, the plaintiff, is entitled to use the front of the said party wall up to the centre line thereof, and that the defendant be enjoined from interfering with the plaintiff in such use.

The plaintiff claims in his complaint to have built the party wall as agreed, and to have used eight inches of its front, and up to the centre line thereof with the front of his building. He would appear to concede that the party wall proper, which he agreed to build,

affidavit mentioned, should be delivered to him as the landlord (or, against the said John Doe, and that the said premises in his said affidavit mentioned, should not be delivered to him as the landlord).

And deponent assigns the following grounds of error, upon which he appeals to the county court of the said county of , to wit:

(State the grounds of error distinctly and concisely.)

RICHARD ROE.

Sworn to before me, &c. }

I hereby allow the within appeal, this day of
187 .

Justice of Supreme Court,
(or) County Judge.

GENERAL INDEX.

For Index to Chapters, see Table of Contents, at page 5.

For Index to Forms, see that title, page 10.

Abatement—by tenant's death, 298.

Acknowledgments—Forms of, 372.

Act—in reference to untenable premises, 129.

“ “ “ Construction of, 129.

“ “ Forcible Entries, 174.

“ “ Summary Proceedings, 182.

“ “ Bawdy Houses, 303.

“ “ Illegal Trades, 307.

“ “ Squatters, 346.

Action for rent—See titles “Rent,” “Use and Occupation,” and “Remedies.”

Adjoining—building, damages from, 72, 134.

See “Party Walls.”

Rights under covenant as to character of, 162.

Inserting beams in, 147, 369.

Excavations, damages from, 134.

Owners, other acts of, 142.

Adjournments—When and for what time, 191, 272.

Affidavit to adjourn, form of, 272.

Adjudication—by magistrate, its effect, 285, 286, 288.

by Jury, 283.

Certified copy as evidence, 289.

Administrators—When to commence proceedings, 75, 76.

Remedies of, 75, 76, 77, 96, 214, 215, 243.

Preference in payment of rent, 63.

Liability of, if possession taken, 85.

Admissions—See title Counter Affidavit.

Affidavit—in proceedings of forcible entry, 175, 200, 201.

of service in same proceedings, 202.

of facts in summary proceedings, 186.

in summary proceedings, who to make, 186.

“ “ its requisites, 237 to 249.

Sufficiency of, tenancy at sufferance, 243.

Whom to be sworn before, 245.

Forms of in summary proceedings, 245 to 250.

Form of by landlord for non-payment of rent, 245.

“ agent “ “ 246.

“ landlord, expiration of term, 247.

“ “ tenancy at will, 247.

“ on sale under execution, 248.

- Affidavit**—Form of on mortgage foreclosure, 249.
of service of summons, forms of, 259 to 261.
to adjourn trial, form of, 272.
of claim, proceedings on execution sale, 292.
under bawdy house act, by landlord, 309.
“ “ “ neighbor, 311.
“ illegal trades act, 312.
on appeal to county court, 376.
- Affirm**—Election to, in case of fraud, 45.
- Agent**—Power of agent to execute lease, 29.
Effect of lease signed by agent without disclosing the owner's name, 30.
Power to accept surrender, 119.
of landlord, may remove certain tenants, 186.
- Agreements**—for occupation of land in city of New York, 8.
effect of tenant entering and refusing to accept lease, 14, 61, 212.
for lease, and lease distinguished, 20.
annulled by warrant, 192, 295.
for party wall, forms of, 368, 369.
for inserting beams in adjoining house, forms of, 369.
- Aldermen**—have jurisdiction on “forcible entries,” 199.
- Amendments**—in summary proceedings, 270.
- Amended Return**—How procured, 337.
- Amount of Costs**—Appeal to County Court, 345.
- Answer**—See title “Counter Affidavit.”
- Appeals**—See titles “County Court,” and “Certiorari.”
to Court of Appeals, in summary proceedings, 193, 194.
from Justices of Peace to County Court, 195, 324.
security thereupon, 195, 330.
from Justices of Peace, 324 to 345.
notice of, form, 328.
by one not a party, 345.
- Appearance**—want of, admits facts alleged by landlord, 263.
- Appendix**, 373.
- Application**—of payments, 54, 55.
- Appropriation**—of payments, 54, 55.
- Appurtenances**—defined, 31.
- Argument**—upon appeal, 339, 340.
Notice of, 339, 340.
- Assignment**—of lease, form, of, 364.
- Assignment Houses**—Of proceedings against, 303 to 313.
- Assigning**—lease, in violation of covenant, 71, 72.
“ “ 83, 84.
- Assignees**—of landlord, remedies of, 76 to 78, 96, 214, 215, 243.
Who are, 84.
Liability of, 84, 85.
Discharged by further assignment, 85.
of lessor, may remove certain tenants, 186.
General, for “Benefit of Creditors” when liable, 85.
Liability as, of party buying at foreclosure sale of leasehold interest, 222.

- Assignor**—remains liable after assignment, 84.
- Attachment**—against witness, form of 359.
Order for, 358.
- Auxiliary remedies**, 222.
- Avoiding**—lease for fraud, 34, 36, 37.
- Award**—of restitution after inquisition, form of, 205.
“ “ Verdict, form of, 210.
See title “Restitution.”
- Bawdy House Act**, 303 to 313.
houses, a nuisance, 307.
houses, criminal liability, 307.
- Beams**—inserted in adjoining house “Form of agreement,” 369.
- Bills**—Payment of rent in, 47 to 52.
- Board and lodging**—Illegal contracts for, 37, 38, 39.
“ Agreement for does not create relation of landlord and tenant, 213.
- Boarders**—Rights of, 30.
- Bond**—on removal of forcible entry proceedings, 180, 316.
how returned thereon, 181.
to stay warrant, form of, 289.
Insolvent tenant, 290.
Tenant on execution sale, 291.
Certiorari, “Forcible Entry Proceedings,” 316.
Ordinary form, 367.
- Bowling alley**—Premises let for, 40.
- Breach of covenant**—When no defense to summary proceedings, 228.
- Brooklyn**—City Judges have jurisdiction of summary proceedings, 219.
- Brothel**—Houses occupied as, 36 to 40, 303 to 313.
- Buffalo**—Justices of Superior Court have jurisdiction.
In summary proceedings, 219.
- Builder's contract**—“Form of,” 370.
- Buildings**—Tenant's right to remove, 87, 88.
See “Adjoining buildings.”
- Caveat emptor**—Maxim of, applies to lettings, 34.
- Certified copy**—Adjudication as evidence, 298.
- Certiorari**—to remove proceedings on forcible entry, 180, 314.
Bond to be given thereupon, 180, 316.
proceedings in Supreme Court, 181.
to review summary proceedings, 193, 317.
not to stay proceedings, 193.
to review proceedings on forcible entry and detainer, with forms, 314 to 317.
Petition for, form of, 317.
to remove proceedings, form of, 316.
Bond on allowance of, form, 316.
Return of justice to, 317.
to review summary proceedings, 317.
Writ of, how obtained, and how returnable, 317 to 319.
Rule in England as to removal of convictions upon certiorari, 320.
Petition for to review summary proceedings, form of, 320.

- Certiorari**—Order directing, form of, 321.
 Return of justices upon, 322, 335, 336.
 Reversal of judgment upon, form of order, 322.
 Restitution upon form of writ, 323.
 by one, not a party, 345.
 See "Appeals to County Court."
- Challenges**—to jury, 278.
- Character**—of previous occupant, effect on lease, 34.
 See "Bawdy Houses" and "Validity of Lease."
- Charge**—of judge, 280 to 282.
- Chattels**—Real, 5.
- Check**—Payment of rent in, 47 to 52.
- City**—Judge of New York, has certain jurisdiction, 199, 219.
 Judges of Brooklyn, have certain jurisdiction, 199, 219.
 of New York. agreements for lettings, 8.
- Common law**—Demand for rent, 225.
- Common Pleas**—Jurisdiction on forcible entries, 199.
 See "County Courts,"
- Complaint**—for forcible entry, 175, 200.
 Form of, 200.
 to be in writing, affidavit therewith, 175, 201.
 Form of, 201.
 to be filed, 201.
 against squatter, 348. .
 tenant for rent, "form of," 359.
 surety for rent, "form of," 360.
- Concealing**—character of former occupant, 34, 35.
 other facts, 42, 43.
- Conclusive**—Return of justice, 337.
- Condition**—of premises, when to be disclosed, 34, 35.
- Conditions**—enforcing compliance of by action, 64.
- Constable**—to summon jury, in summary proceedings, 189, 271.
- Constable's**—return to venire, in summary proceedings, 271.
 to execute process on forcible entry, 179.
 return to precept on proceedings on forcible entries, 203.
 in city of New York are marshals, 296.
- Construction**—Rules applicable to summary proceedings, 216.
- Contents**—See "table of," in front of book.
- Contract**—Builder's, form of, 370.
- Conventional**—relation of landlord and tenant, when it exists, 59 to 63, 211, 212.
- Cornish**—of adjoining house overhanging, 72, 73.
- Corporations**—Leases by, and to, 102, 103.
- Costs**—on reversal of summary proceedings, 194, 319. .
 Forcible entry proceedings, 315.
 Appeal to County Court, 343 to 345.
 Setting off in County Court, 343.
 How awarded, 342.
 of summary proceedings in city of New York, how collected, 296.

- Cultivation**—tenants under agreement for, 185, 212.
- Counter affidavit**—in summary proceedings, 189, 266 to 269.
- Counter claim**—for want of repairs, 104, 105.
- County Courts**—Appeals to, from justices of peace, 195, 324 to 345.
 Review of adjudication before justices, 325, 326.
 Notice of appeal to state grounds, 327.
 Form of notice of appeal, 328.
 “ appeal, 328.
 Service of notice of appeal, 328, 330.
 Security upon appeal, form of, 330, 331.
 Errors and omissions in, 332.
 Execution, how stayed pending appeal, 332.
 Effect of appeal and extent of stay, 332.
 Death of justice and filing undertaking, 333.
 filing notice of appeal instead of service, 333.
 Return when and how made and compelled, 333.
 “ what to contain, 334. .
 Impeaching return, 335.
 False return. 335.
 Form of justice's return, 335, 336.
 Return how made, if justice out of office, 337, 338.
 Further return may be ordered, 337.
 Return conclusive, 337.
 How to procure amended return, 337.
 Form of order to show cause, 337.
 In case justice be dead, insane, or absent, 338.
 hearing upon return, 339, 340.
 dismissing appeal if not brought on, 339.
 Only one notice necessary, 339.
 To be heard on original papers, 339.
 Objections and exceptions, 340.
 rehearing, 341.
 Respondent must appear, 341.
 Judgment, how given, 341.
 Judgment roll, 342.
 Costs, how awarded, 342.
 ordering restitution, 342.
 setting off costs, 343.
 Costs on appeal, 343 to 345.
 By one not a party, 345.
 rehearing upon appeal, 341.
 Respondent must appear at argument, 341.
 Affidavit upon appeal to, 376.
- County Judges**—Jurisdiction, forcible entries, 175, 180.
 “ “ in summary proceedings, 184, 219.
- Court of Appeals**—Review by, in summary proceedings, 193, 194.
 “ forcible entries, 315.
- Covenants**—express and implied, 27.
 to renew, see “Renewals” and “Forms of.”
 Enforcing by action, 64.
 “ Forfeitures for breach, 69.
 to repair, 106 to 108.
 “ includes what, 108.
 “ effect of, 108.

- Covenants**—Action for breach, 109, 110.
 running with the land, 111.
 as to character of adjoining buildings, 162.
 in leases, 361 to 363.
- Creation**—and division of estates, 5.
- Criminal Courts**—may award restitution for forcible entries, 181.
- Damages**—to property by malicious injury, 57, 58.
 “ “ from adjoining buildings, 72 to 74, 134 to 143.
 for withholding possession of property from tenants, 82.
 to evicted tenant, 83.
 upon reversal of summary proceedings, 194, 319, 350, 355.
 Summary proceedings in cases in which magistrate has no jurisdiction, 350.
- Death**—of landlord, rent to go to whom, 75, 76, 96, 214, 215, 243.
 “ “ who to commence proceedings, 76, 214, 215, 243.
 “ tenant, effect of, 298.
- Decision**—of magistrate, 284.
 “ “ its effect, 284, 288.
 “ “ when to be rendered, 287.
- Default**—of tenant on return day admits facts, 263.
- Defense**—filing counter affidavit, 189, 266 to 269.
 breach of covenant, 228.
 See eviction, surrender, untenable premises.
 Validity of leases.
- Definition**—of year, half year and quarter of year, 9.
 of month, 10.
 of leases, 19.
 of certain terms, 30.
 of rent, 31, 221.
 of covenants running with the land, 111.
 of surrender, 115.
 of easement, 161.
 of real estate, 32.
- Deliberations**—of jury, 282.
- Demand**—for rent, 185, 223 to 228.
 “ when and how made, 223 to 228.
 “ on joint tenants, 228.
 for jury trial when to be made, 270.
- Denial**—See title, “Counter Affidavit.”
- Demise**—The act of granting, an estate is called a demise, 19.
- Description**—of premises, what sufficient, 243 to 245.
- Deserted Premises**—Statute in reference to, 183.
 When justice to view, 183.
 When landlord to be put in possession, 183.
 Appeal by tenant when and how made, 183.
 Power of county court restitution, 184.
- Detainer**—forcible, see title forcible entry and detainer.
- Determination**—of particular estate by notice to quit, 13.
 of certain leases, 28.
- Disclosing facts**—See title, concealment and *suppressio veri*.
- Dismissing appeal**—if not brought on, 339.

- Disorderly house**—Proceedings against 303 to 313.
- Dispossession**—Remedy after, 295.
- Dispossessing proceedings**—The statute relative to, 182 to 196.
 Law and practice upon, 211 to 298.
 Injunction enjoining, 299 to 303.
 against bawdy houses, 303 to 313.
 against illegal trades, 307 to 313.
- District Court**—Justices jurisdiction, forcible entries, 180, 199.
 “ “ “ Summary proceedings, 184, 185, 219.
- Division**—of estates, 5.
- Docket**—of justice of peace, 195, 324.
- Double Rent**, 17.
- Easements** Certain, 161.
 “ Definition of, 161.
 “ See title, “Party Walls.”
- Eaves**—of adjoining buildings overhanging, 72, 73.
- Effect**—of tenant's death, 298.
- Election**—to affirm in case of fraud, 45.
 between inconsistent remedies, 79.
 Purposes rooms hired for, 40.
- Eminent**—Domain, effect of exercising right of, 127.
- Endorsement**—upon summons in summary proceedings, 188.
 “ “ form of, 257, 258.
- Enjoining**—summary proceedings, 299 to 302.
- Entries**—upon land to be peaceable, 174, 197, 198.
- Estates**—creation and division of, 5.
 Of inheritance, 5.
 for life, 5.
 for years, 5, 8.
 at will, 5, 10, 15, 235.
 by sufferance, 5, 10, 15, 235.
 of freehold, 5.
 Determination of, see Holding over, 7.
 at will and by sufferance terminated by notice to quit, 13.
- Estoppel**—Tenant estopped from disputing landlord's title, 97.
 “ Extent of rule, 97.
- Eviction**—and what amounts to, 121 to 128.
 Effect of erections on adjoining lot, 127, 141.
 Effect of, 127, 128.
 “ acts of adjoining owners no eviction, 127, 141.
 Eminent domain, 127.
 Damages for, 83.
- Evidence**—upon trial, 279.
 Certified copy adjudication, 298.
- Excavations**—133 to 144.
 Right to make, 133.
 as affecting adjoining owners, 134.
 Effect of adjoining upon tenants, 134.
 Other acts of adjoining owners, 142.
 adjoining highway, 143.

Exceptions—and objections, 340.

Execution—sale on judgment tenant holding over after, 185, 236.
 proceedings founded upon bond therein, form of, 291.
 Sale, affidavit in such case, 292.
 how stayed upon appeal to county court, 332.
 form of other affidavits in proceedings on sale, 248.

Executors—Preference by in payment of debts, 63.
 Remedies of, 75, 76, 96, 214, 215, 243.
 When to commence proceedings, 75, 76, 96, 214, 215, 243.

Expiration—of term, see title *Holding-over*.
 of certain leases, 28, 232.

Express covenants, 27.

Extension of lease—see title, *Renewal*.

False—Representation, see title *Fraud*.
 Return of justice, 335.

Farms—Cultivation agreement for, 185, 212.

Fee—Simple absolute, 5.

Fendal—Tenures in this country, 1 to 4.
 Tenures in England, 1 to 4.

Fixtures—Right of tenant to remove, 86, 87, 88.

Forcible entry and detainer—Statute relating to, 174.
 “ “ Index to said statute, 174.
 “ “ The law and practice upon, with all
 the forms used therein, 197 to 210.
 “ “ Proceedings how instituted, 199.
 “ “ Review by certiorari, 314 to 317.
 “ “ Officers having jurisdiction, 180, 198.

Foreclosure—of mortgage, tenant holding over after, 185.
 “ “ upon lease, effect of, 222.

Forfeiture—for breach of condition, enforcing, 69.

Former adjudication—Effect of, 283, 284, 288.

Forms—See index to, in front of book.
 under forcible entry proceedings, see pp. 197 to 210.
 under summary proceedings, see pp. 211 to 302.
 under bawdy house proceedings, see pp. 309 to 313.
 under illegal trade proceedings, see pp. 309 to 313.

Fraud—Effect of, upon lease, 34 to 44.
 in misrepresenting rental, 41.
 “ “ value, 41.
 Remedy in case of, 44.
 Election to affirm, 45.
 Effect of taking possession, 45.
 See title *Rescission*.
 Rescission for, 91.

Freehold estate, 5.

Furnished house—Implied warranty in letting, 123.

Further return—of justice, how procured, 337.

Gutter—of adjoining building, damages from, 72, 73.

Grantees—Remedies of, 76 to 78, 214, 215, 243.

Hearing—Notice of, 339, 340.

- Hearing** —Notice of only one notice necessary, 339, 340.
 “ “ of on original papers, 339.
 “ “ of objections and exceptions, 340.
 “ “ of judgment how given, 341.
 “ “ See title, “Trial.”
- Hereditaments**—defined, 31.
- Heirs-at-law**—right of, to rent, 75, 76, 96, 214, 215, 243.
 when to commence proceedings, 76, 214, 215, 243.
- Highway**—work upon, and assessment therefor, 100.
 Excavations upon, see Excavations.
- Holding-over**—liability for, after determination of certain estate, 7.
 Effect of, 8, 25, 230, 231, 232.
 after notice to quit, effect of, 17.
 tenants to be removed, 184.
 after expiration of term, 185.
 after sale on execution of mortgage, 185.
 after taking insolvent act, 185.
 after term on agreement to cultivate, 185.
 the cases contemplated by statute, 231.
 must be without landlord's permission, 233.
 who to commence proceeding for in certain cases, 233, 234.
 increased rent after notice, 235.
 remedy of landlord for rent against over-holding tenants, 295.
- House**—and message are synonymous terms, 31.
 “ “ What is included in the term, 31.
 Tenant's rights to remove house erected by him, 87.
- Illegal**—purposes, houses hired for, effect of, 36, 37, 38, 39, 40, 307.
 “ knowledge required, 38, 39, 40.
 leases, see titles signifying illegal purposes.
 Trades, proceedings against, 307 to 313.
- Ill-fame**—Houses of, proceedings against, 303 to 313.
- Immoral**—purposes, hiring for, effect of, 36, 37, 38, 39, 303.
- Impeaching**—Justice's return, 335.
- Implied**—covenants, 27.
 warranty in lettings, 34, 35, 123.
- Incoming Tenant**, 233.
- Inconsistent**—Remedies, election between, 79.
- Increasing**—rent by notice, 235.
- Infants**—leases to, 100.
 removal of by summary proceedings, 100.
- Infancy**—no defense to summary proceedings, 215.
- Inheritance**—Estate, of, 5.
- Injunction**—to enjoin summary proceedings, 299 to 302.
- Injury**—maliciously done to property, 57, 58.
- Inquisition**—Jury to examine and return, 176.
 Form of, 204.
 Traverse of, 176.
 Traverse, form of, 206.
 when to stay proceedings, 176.
 when and on what terms landlord may traverse, 176.

- Insolvent Act**—Tenant taking may be removed, 185.
Bond to stay proceedings, form of, 290.
- Interest**—on rent, landlord entitled to, 232.
- Intruders**—are not Tenants, 214.
- Joinder**—of parties as landlord in summary proceedings, 222, 233, 234.
- Joint**—Tenants, Remedies of, 96.
Tenants, Demand upon, 228.
- Judge's**—Charge, 280 to 282.
- Judgment**—for defendants if not guilty on forcible entry, 178.
sale under execution upon tenant holding over, 185.
How given, 284, 285.
Form of, 285.
Validity of, 286.
Within what time, 287.
Effect of, 288.
before justice of the peace, 195.
“ “ “ “ form of, 285, 324.
“ “ “ “ docket of, 324.
Form of, under Bawdy House Act, 313.
“ “ Illegal Trades Act, 313.
How given upon appeal, 341.
Roll, “ “ “ 342.
Effect upon other remedies, 79.
- Jurisdiction**—in forcible entry proceedings, 180, 198.
in summary proceedings, 184, 219.
of district court justices, 185.
Rule in reference to, 350 to 356.
- Juror's**—summons, Form of, 272.
Drawing of, 277.
Talesmen, 275.
Form of oath to, in summary proceedings, 278.
“ “ “ on forcible entry, 203, 209.
In forcible entry proceedings, fine, &c., 179.
- Jury**—Precept for, on forcible entries, 175, 203.
Form of, 201.
Number composing, 203.
to be sworn to examine and return inquisition, 176.
Form of oath, 203.
to be summoned to try traverse, 177, 207.
Form of precept, 208.
to be sworn, proceedings before them, 177.
“ form of oath, 209.
when to be discharged, and whenever one to be summoned, 177.
trial in summary proceedings, 189, 270, 271, 275.
“ waived if not demanded, 270.
how summoned, 189, 270, 271.
drawn and sworn, 190, 275, 276, 277.
Talesmen, when and how summoned, 190, 275.
how kept, 190, 282.
Officer in charge to be sworn, 190, 265, 266, 282.
form of oath, 282.

- Jury**—When discharged and new one formed, 190.
 Venire, form of, 271.
 Officers' return of service, 271.
 Deliberations of, 282.
 Polling, 283.
- Justice of the peace**—Judgments before, 195, 285, 324.
 Appeal from to county court, see title, "County Court."
- Justices**—Liability in certain cases, 350 to 356.
 return on forcible entry proceedings, 317, 335.
 " on summary " " 322, 334 to 336.
 charge to jury, 280 to 282.
- Keeper of poor-houses**—may be removed, 186.
- King**—The source of title in England, 4.
- Land**—defined, 30.
 entries upon to be peaceable, 174, 197, 198.
 sold on execution proceedings upon sale, 236.
- Lands**—Title to, in certain cases in the people of the state, 1.
 " " " United States, 4.
- Landlord**—Rights of after service of notice to quit, 17.
 duty as to informing tenant of character of previous occupants,
 34, 35.
 Remedies of the, 56 to 80.
 Remedy of use and occupation, 59 to 63.
 enforcing covenants and conditions by action, 64.
 Liability for withholding possession, 81, 82.
 and tenant, certain rights and disabilities, 97.
 Tenant can not dispute landlord's title, 97.
 " " " extent of rule, 97.
 Liability to third persons, 165 to 173.
 may remove certain tenants, 184, 186, 211.
 and tenant, when relation exists, 59 to 63, 211 to 214.
 " liabilities incidental to remedies, 350 to 356.
- Law and practice**—On forcible entries, 174 to 181.
 " " summary proceedings, 211 to 298.
 " " enjoining " 299 to 302.
 " " Bawdy houses, 303.
 " " Illegal trades, 307.
 " " Squatters, 346.
- Lease**—Expiration of, see title, Holding-over.
 defined, 31, 19.
 void, possession under, effect of as to term, 9, 14, 30.
 Definition, nature and validity of, 19.
 Parties to, 19.
 Words necessary to constitute, 19.
 by correspondence, 20.
 and agreement for distinction, 20.
 How far receipts operate as a lease, 21.
 certain to be in writing, 25.
 different covenants, 362.
 Effect of refusal to accept after entry, 14, 61.
- Leases**—for years are no longer deemed terms, but estates, 26.
 how subscribed, 26.
 Validity of future terms, 26.

Leases—Validity of covenants, 27.

Renewal of, 27.

“ Option of renewal, 28.

When certain lease expire, 28, 29, 232.

Power of agent to execute, 29.

Execution of by agent, owner's name not disclosed, 30.

Recording of, 32.

Validity of, as affected by fraud, 34.

Rescinding for fraud, 34, 36, 37 to 46.

See titles “ Fraud,” “ Rescission.”

Restrictions in, effect of, 64 to 72.

Assigning, 83, 84, 85, 86.

annulled by warrant in summary proceedings, 192, 284 to 288.

Other rights not affected, 194, 288.

Effect of foreclosure of mortgage upon, 222.

Certain, void, 34 to 46, 303, 307.

with covenants, form of, 361, 362, 363.

Covenants in, 362, 363.

Assignment of form of, 364.

Mortgage on, form of, 365.

Leasehold Estate—Sale of, 86.

“ “ “ conditions of, 86.

Legal—representatives may remove certain tenants, 75, 76, 96, 186, 214, 215, 243.

meaning of certain terms, 30, 31.

Lessees—under Brooklyn tax sales may institute summary proceedings, 186.**Lessor**—may remove certain tenants, 184, 186, 211.**Letting**—See title, “ Leases.”**Liability**—for holding over after determination of certain estates, 7.

of “ Landlord,” “ Tenant,” and of “ Justice,” see those titles.

of landlord withholding possession, 81, 82.

See titles Assignee, Assignor, Landlord, Tenant.

to third persons, 165 to 173.

of third persons to landlord, 173.

incidental to remedies, 350 to 356.

Life—Estates for, 5, 6.

Tenancy for, 5, 6, 7.

Incidents of estate for life, 6, 7.

Estates for incidents of, 6, 7.

Remedy on leases for, 7.

rents dependent upon life of another, 63.

Lodgers—Rights of, 30.**Lodging**—Illegal contract for, 34 to 41.**Magistrates**—having jurisdiction of forcible entries, 180, 198.

“ “ “ summary proceedings, 184, 219.

Malicious—injury to property, remedies for, 57, 58.**Marine**—Court justices have no jurisdiction of forcible entry proceedings, 180, 199.

Court justices have jurisdiction of summary proceedings, 184, 219.

Marshals—to execute process on forcible entries, 179, 296.

- Marshals**—in the city of New York are constables, 296.
 return to precept on forcible entry, 203.
 to summon jury in summary proceedings, 189, 270, 271.
 return to venire in summary proceedings, 271.
- Master**—and servant, relation of, 214.
- Maxims**—27, 34.
- Mayors**—of cities have jurisdiction on forcible entries, 180, 199.
 of cities have jurisdiction in summary proceedings, 184, 219.
- Messuage**—and House are synonymous terms, 31.
 and House, what is included in term, 31.
- Misrepresentation**—See “Fraud.”
- Mistake**—Recision for, 91.
- Month**—Definition of, 10.
- Monthly**—Tenancies, 9, 14, 21, 22 to 25
- More**—or less defined, 31.
- Mortgage**—on lease, form of, 365.
 on lease, effect of foreclosure, 222.
- Nature of leases**, 19.
- New York City**—Agreements for occupation of lands in, 8, 9, 14, 21 to 25, 30.
 “ “ Officers having jurisdiction, see titles, “Forcible Entry,” “Summary Proceedings.”
- Note**—payment of rent in, 47 to 52.
- Notice to quit**—in what cases necessary, 13 to 18, 21 to 25, 232, 235.
 “ form of, 16.
 “ service of, 16.
 “ rights of landlord after notice, 17.
 “ by tenant, effect of not yielding possession, 17.
 Effect of possession as, 33.
 to defendant in forcible entry proceeding, 175.
 “ form of, 202.
 of appeal to county court, form of, 328.
 termination of certain estates by, 232, 333.
 “ “ “ “ see Tenancies at will and by sufferance.
- Hearing**, 339, 340.
 “ only one notice necessary, 339, 340.
 to quit to squatters, 347.
- Nuisances**—upon adjoining property, 34, 35, 72, 73, 74, 127, 134.
 Right to abate, 34 to 46, 72, 74.
 Effect of, upon hiring, 34 to 46.
- Oath**—to jurors in summary proceedings, form of, 278.
 to officer having charge of, form of, 282.
 to witnesses in summary proceedings form of, 274.
 to jurors in forcible entry proceedings, 176, 177, 203, 209.
 form of in such proceedings, 203, 208.
 to witnesses in forcible entry proceedings 204, 209.
 form of, 203, 209.
- Objections**—to be made or be deemed waived, 262 to 266.
 and exceptions, 340.
- Occupation**—Covenants as to mode of, effect of, 66 to 72.

Occupation—Effect of as notice, 33.

“ See Use and occupation.

Occupants—character of, former effect on lease, 34 to 36.

Officers—having jurisdiction, see “Forcible Entry,” Summary proceedings.

Openings—on sidewalk, liability for, 172.

Option—on renewal, 28.

Order—directing certiorari to issue, form of, 321.

of reversal of summary proceedings, form of, 322.

to show cause for amended return, 337.

Parties—Joinder of as landlords in summary proceedings, 222, 233, 234.

Partners—leases to, 101.

Payment of rent—Time of, 47.

Mode of, 47.

in check, note, or bill, 47 to 52.

Tender of, when and how made, 52, 53.

after commencement of proceedings, 228, 288.

Payments—application of, 54, 55.

Party-walls, 145 to 160, 373.

When agreement runs with land, 114, 145 to 164, 373 to 376.

exist by grant or prescription, 145.

when by verbal agreement, 146.

when certain walls become, 148 to 151.

not an incumbrance, 151.

Provisions of building law as to, 151 to 154.

increasing thickness, 154.

diminishing thickness, 155.

increasing height and depth, 155.

repairing, 156.

taking down, 157.

rebuilding, 159.

Agreement as to three forms, 368, 369.

Right to use face of, 373 to 376.

Peace—Justices of. Proceedings before, 195.

“ Judgment and docket, 195, 285, 286, 324.

“ Appeals to County Court. See title “County Court.”

“ Jurisdiction of summary proceedings, 184, 219.

Penalty—on tenant not yielding possession, 17.

“ holding over after notice, 17.

Peremptory—right of challenge not allowed in summary proceedings, 278.

Permission—holding over must be without, 233.

Petition—for certiorari on forcible entry, form, 315.

“ “ on summary proceedings, forms, 320.

Pier—or wharf, when within the act, 213.

Polling—the jury, 283.

Poor House—keeper may be removed, 186, 212.

Possession—under void lease, effect of, 9, 14, 30, 34 to 46.

under lease void for fraud, 45.

- Possession**—when remaining in amounts to election to renew, 27.
 Effect of as notice, 33.
 right of, and damages for withholding, 81, 82.
 of sub-tenant, possession of tenant, 86.
 Certain provision affecting tenant's, 99.
 of tenant when deemed possession by landlord, 99.
 any person in possession may file counter affidavit, 189, 266 to 269.
- Practice**—upon forcible entry proceedings, 174 to 181.
 upon summary proceedings, 211 to 298.
 upon return day, 262.
- Precept**—for jury on forcible entry proceedings, 175.
 “ “ “ form, 201.
 “ “ notice of, 175.
 “ “ proof of service of notice, form, 202.
 “ “ officer's return to, form of, 203.
 or writ of restitution, form, 206.
 for jury to try inquisition, form, 208.
- Preface**—see front of book.
- Premises**—sufficiency of description, 243 to 265.
- Process**—Return of, 262.
- Proof**—of service on tenant, what to contain, 188.
 “ “ “ forms of, 259 to 261.
- Prostitution**—Rooms hired for, 36, 38, 39.
 Houses, proceedings against, 303 to 313.
- Protection**—of warrant, 295.
- Quit**—Notice to, in what cases necessary, 13, 235.
 “ “ see title “Notice to Quit.”
- Race-course**—Premises let for, effect of, 41.
- Real**—chattels, 5.
 estate defined, 32.
- Receipt**—operates as a lease, when, 21 to 25.
 How far open to explanation, 21.
 Tenant not entitled to, 53, 229.
- Rescinding**—lease for fraud, 34 to 37, 44, 45, 46.
- Rescission**—for fraud or mistake, 91.
- Recording**—leases, 32.
- Recorders**—of cities have jurisdiction in forcible entry proceedings, 180, 199.
 “ “ “ “ summary proceedings, 184, 219.
- Redemption**—Right of, after warrant, 196, 297.
- Refusal**—Effect of giving tenant's refusal on renewal, 27.
 Option of tenant, 28.
- Relation**—of landlord and tenant, when and between whom it exists, 59 to 63, 211 to 214.
- Remedies**—on leases for life, 7.
 in cases of fraud, 44.
 of the landlord, 56 to 80.
 Executors and administrators, 75.

- Remedies**—Grantees and assignees, 76 to 78.
Effect of judgment upon other, 79.
Election between inconsistent, 79.
of the tenant, 81 to 90.
of the tenant for wrongful entry, 94.
of assignees and representatives, 96.
of legal representatives, 96, 214, 215, 243.
Joint tenants, 96.
see titles "Forcible Entries," "Summary Proceedings."
of landlord for rent after issuing warrant, 295.
Auxiliary, 222.
Liabilities incidental to, 350.
- Removal**—of squatters—see title Squatters.
- Renewal**—of leases, 27, 28.
What amounts to, 27, 28.
Covenant for, how construed, 28.
whether new lease necessary, 28.
- Rent**—when payable on void lease, 9, 14, 30.
when payable on void lease, 14, 30.
defined, 31, 221.
Time of payment, 47.
Mode of payment, 47.
Payment by check, note or bill, 47, 48.
depending upon life of another, 63.
Preference in payment of by executor, 63.
To whom it belongs in case of landlord's death, 75, 76.
not suspended by adjoining excavations, 127, 141.
Payment by sub-tenant, 89.
Tenants failing to pay may be removed, 184.
Demand for, 185, 223 to 228.
In kind, how collected, 221, 222.
Interest upon, landlord entitled to, 222.
Payment of, after commencement of proceedings, 228, 288.
increased by notice, 235.
Security for, form of, 363.
Complaint against tenant for rent, form of, 359.
Complaint against surety for rent, form of, 360.
See title, "Use and Occupation."
after dispossession, 295.
- Rental**—Misrepresenting effect on lease, 41.
- Repair**—Obligation to, 104.
Obligation to, under covenant, 106 to 108.
Action for breach of covenant to, 109.
Extent of landlord's liability, 109, 110.
Effect of covenant, 108.
- Representatives**—Legal, may remove certain tenants, 186.
Legal remedies of, 75, 76, 96, 214, 215, 243.
Legal who are, 243.
- Res adjudicata**—283, 284, 288.
- Restitution**—and collection of costs, forcible entry proceedings, 178.
to issue if there be no traverse, 179.
Form of award, 205.
to be awarded in certain cases, 181, 205.

Restitution—Criminal courts may award, 181. !

Precept or writ, form of, 206.

after verdict, form of award, 210.

“ “ “ writ, 210.

by Supreme Court in summary proceedings, 194, 319.

in summary proceedings, writ of, 323.

Restraint—of trade, 64 to 72.

Restrictions—in lease, effect of, 64 to 72.

Returnable—when summary proceedings to be made, 186, 252.

where summary proceedings to be made, 185, 284 to 288.

Return day—Practice upon, 262.

of Justice to certiorari, forcible entry, 317.

“ “ “ summary proceedings, 322, 332 to 336.

of justice, how compelled, 333.

“ what to contain, 334.

“ impeaching, 335.

“ false, 335.

“ form of, 335, 336.

“ how made if justice out of office, 337, 338.

“ further return may be ordered, 337.

“ conclusive, 337.

“ How to procure amended return, 337.

“ form of order to show cause, 337.

“ in case justice be dead, insane, or absent, 338.

“ in case justice in another county, 338.

“ Hearing upon return, 339, 340.

Reversal—of summary proceedings, order on, 322.

“ “ “ damages on, 355, 356.

Reversioner—Rights of 58.

Review—See “Appeal,” “Certiorari.”

Rights—of landlord after service of notice to quit, 17.

of lodgers, 30.

of tenants. See “Rights of Lodgers,” 30.

of the tenant, 81 to 90.

“ under-tenant, 88.

of way, 161.

annulled by warrant, 192, 194, 295.

of redemption, 196, 297.

Rules—of construction, 216.

Sale execution—Bond in proceedings, form of, 291.

Affidavit of claim in same case, form of, 292.

or foreclosure—tenant holding-over after, 185, 236.

of leasehold estate, 86.

landlord's affidavit on, 248.

Sales—Tax in Brooklyn, lessees may institute summary proceedings, 186.

Security—upon appeal to county court, 195, 330, 331.

“ “ “ form of, 330, 331.

“ errors and omissions in, 332.

for rent, form of, 363.

Servant—and master, relation of, 214.

Service—of subpoena, proof of, 358.

Service—of summons, manner of, 258.

of summons time of, 259.

“ “ proof of, 259 to 261.

“ “ forms of, proof of, 259 to 261.

“ “ how made, 187, 258.

“ “ proof of what to contain, 188.

“ “ 259 to 261.

Setting—off costs upon appeal, 343.

Sheriff—to execute process on proceedings for forcible entry, 179.

Return of on precept, proceedings for forcible entry, 182.

to summon jury in summary proceedings, 189, 270, 271.

Return of to venire in summary proceedings, 271.

Sidewalk—openings upon liability, for, 172.

Socage—tenure, 2.

Sovereignty—title of the People, 1.

Specific performance, 64 to 72, 86.

Squatter act, 346 to 349.

Removal of squatters, 346, 347.

Penalty, 346.

serving of notices, 346.

Notice to quit, 347.

Complaint against squatter, 348.

warrant against squatter, 348.

Proceedings upon, 349.

Statute—relating to occupation of lands in the city of New York, 8.

“ the creation and division of estate, 5.

“ untenable premises, 129.

“ forcible entries and detainers, 174 to 181.

“ summary proceedings, 182, 211 to 298.

“ “ object of, 211.

“ “ construction of, 216.

“ Review of summary proceedings upon certiorari, 193, 317.

“ bawdy houses, 303.

“ illegal trades, 307.

“ squatters, 346.

Statutory—demand for rent, 226.

Staying—warrant in case of rent, 192.

“ “ insolvent tenant, 192.

“ “ land sold under execution, 193.

proceedings by certiorari, see Certiorari.

proceedings by appeal, see Appeal.

summary proceedings, form of, bonds for, 289 to 292.

summary proceedings by injunction, 299 to 302.

Subpoenas—for witness on forcible entries, 179.

“ “ on summary proceedings, 357.

“ “ form of, 357.

“ “ proof of, service of, 358.

Substitution—of tenant's power of, agent to consent to, 29.

“ “ see Surrender.

Sufferance—tenancy by terminated by notice to quit, 13 to 18, 21 to 25, 235.

Sufferance—Estates by, 5, 10, 15, 235.

Tenancies by, 5, 10, 15, 235.

Tenant by proceedings against proof required, 187.

Notice to quit, see title Notice to Quit.

Sufficiency—of papers, objections to, 262.

Suggestio Falsi, effect of, 42.

Summary proceedings—The statute relating to, 182 to 196, 211 to 298.

Index to statute, 182.

Law and practice, 211 to 298.

Who may institute, 186, 233.

The object of the statute, 211.

Construction of statute, 216.

Review of, upon certiorari, 193, 317.

See title Joinder of Parties.

against bawdy houses, 303 to 313.

against illegal trades, 307 to 313.

Reversal upon certiorari, form of order, 322.

Restitution upon certiorari, form of writ, 322.

Officers having jurisdiction, 180, 184, 198, 219.

Summons—What to contain, 251, 252.

Time of return, 252.

Forms of, 253 to 258.

Forms of for non-payment of rent on landlord's affidavit, 253.

“ “ “ agent's affidavit, 253.

“ proceedings against tenant and under-tenants, 253.

“ for holding-over, 254.

“ tenancy at will, 255.

“ Sale under execution, 255.

“ Mortgage foreclosure, 256.

“ Endorsement upon, 257, 258.

Proof of service of, 259 to 261.

Manner of service, 187, 258.

Time of service, 259.

Forms of proof of service, 259 to 261.

for jurors, form of, 272.

Endorsement required upon, 188.

to tenant when and what to contain, 186.

Proof required in certain cases before issuing, 187.

under bawdy house act, affidavit landlord, 310.

“ “ neighbor, 311.

under illegal trades “ landlord, 313.

Endorsements upon, 313.

Superior Court—of Buffalo, justices have jurisdiction of summary proceedings, 219.

Jurisdiction of forcible entries, 199.

Suppressio veri—Effect of, 42, 43.

Supreme Court—Justices of, have jurisdiction of forcible entry proceedings, 180, 199.

General term to review adjudication of magistrates upon certiorari, 193.

Proceedings in upon certiorari on forcible entries, 181.

Traverse in forcible entry proceedings removed into Supreme Court, 317.

Surrender, 115 to 120.

How made and what amounts to, 115 to 120.

Agent's power to accept, 119.

by accepting new lease, 119.

of tenant's power of agent to consent to, 29.

Talesman—in summary proceedings, how summoned, 190, 275.**Tax sale**—in Brooklyn, leesses under may institute summary proceedings, 186.**Tenancy**—for life, 5.

for years, 5.

at will 5, 10, 235.

by sufferance, 5, 10, 15, 235.

by the month, 9, 14, 21 to 25.

at will, and by sufferance how terminated, 13, 235.

from year to year, 15, 25, 235.

Tenant—entering and refusing to accept lease, 14, 61.

Penalty for not yielding possession, 17.

Penalty for holding-over after notice, 17.

not entitled to receipt, 53, 229.

Rights of, 81 to 90.

right of possession or damages, 81, 82.

Damages to evicted tenant, 83.

right to remove fixtures, 86 to 88.

Remedies of, 91 to 96.

Remedy for wrongful entry, 94.

estopped from disputing landlord's title, 97.

“ extent of rule, 97.

to deliver certain writs to landlord, 99.

Possession of, when deemed landlord's, 99.

Liability of for want of repairs, 104.

Liability of to third persons, 165 to 173.

See Holding-over, Rent, Lodgers, and other titles.

may be removed in certain cases, 184, 211.

“ “ for holding-over, 184, 230.

“ “ for not paying rent, 184, 221.

“ “ if he takes the benefit of Insolvent Act, 185.

“ “ on execution or mortgage sale, 185.

“ “ for holding-over under agreement to cultivate land on shares, 185.

may file counter affidavit, and have trial, 189, 266 to 269.

may redeem after warrant, 196.

Death of, effect of, 298.

See titles Bawdy Houses, Illegal Trades.

Tender—of payment, 52, 53.

Plea of, 53.

demand for receipt defeats, 53, 229.

Tenement—defined, 31.**Tenure**—of real property, 1.

signifies a holding, 3.

Termination—of estates—see under titles of the Particular Estates.

of certain estates by notice, 13 to 18, 21 to 25, 232, 235.

of certain leases, 28, 232.

Three days' notice—Demand of rent by service of, 224.

- Time**—See "Holding Over."
- Title**—to certain lands in the people of the state, 1, 2.
 " " " United States, 4.
- Trades**—Illegal, 307 to 313.
 Restraint of, 64 to 72.
- Traverse of Inquisition**—in forcible entry proceedings, 176.
 Form of, 206.
 when to stay proceedings, 176.
 When landlord may, 176.
 Jury to try, 177.
 Supreme Court, 317.
- Trespassers**—upon lands, 57, 58.
 See titles "Squatters," "Intruders."
- Trial**—of inquisition in forcible entry proceedings, 176.
 of traverse of inquisition, " 177.
 Matters to be shown thereon, proceedings, 178, 207, 209.
 by jury in summary proceedings, 275 to 278, 282, 283.
 Adjournment of, 272.
 Affidavit to adjourn, form of, 272.
 Proceedings upon, 274 to 283.
 without a jury, 274.
 Oath to witnesses, form of, 274.
 by jury, 275.
 Talesman, 275.
 Qualifications and drawing of, 276, 277.
 Evidence upon, 279.
- Underletting**, 83, 84.
 Right of, 89.
- Undertaking**—upon appeal to county court, 195.
 " " " " form of, 330, 331.
 Errors and omissions upon, 322.
- Under-tenant**—Rights of, 88.
 right of to pay original landlord, 89.
 right to sub-let, 89.
- Untenantable premises**—Statute in reference to, 129.
 Construction of said statute, 129.
- Use**—and occupation, 59 to 63.
- Validity**—of judgments, 286.
 of leases, 19, 30, 34 to 44.
 " future terms, 26.
- Value**—Fraudulently misrepresenting, 41.
- Various**—statutes relative to summary proceedings, 211 to 298.
- Vendee**—of real estate, 60, 61, 213.
- Vendor**— " " 60, 61, 213.
- Venire**—for jury summary proceedings, 189.
 " " " form of, 271.
- Verbal**—agreements, 25, 26.
 Leases, 25, 26.
- Verdict**—of the jury, 282, 283.
 " Effect of, 288.
- Void lease**—Possession under effect of, 9, 14, 30.
 Effect of occupation thereunder, 30.

Waiver—of objections, 262 to 265.

“ jury trial, 270.

Walls—of adjoining house over-hanging, 72 to 74.

Party. See title “Party Walls,” and title “Excavations.”

Warrant—Annuls lease, 192, 295.

Not to effect other rights, 194.

How stayed in case of rent, 192.

How stayed in case of sale, 193.

How stayed in case of insolvent tenant, 192.

How stayed under execution, 193.

Bond to stay, different forms of, 289, 290, 291.

Issuing of, its form and effect, 293.

Forms of, 293, 294, 295.

Effect of, 295.

Remedy of landlord after issuing of, 295.

Protection of, 295.

Right to remove person not named in, 296.

Form of, under bawdy house act, 313.

Form of, under trade illegal act, 313.

Form of, by Justices of the Peace, 325.

Form of, against squatter, 348.

to issue if no cause shown, 188.

to issue if decision or verdict be for landlord, 191.

how executed, 191.

Warranty—when and to what extent implied in a letting, 34, 35.

in case of furnished house, 123.

Waste, 6, 7, 57.

Way—Right of, 161.

Widow—of deceased, tenant proceeding against, 214.

Will—Estate at, 5, 10, 15, 235.

Tenancy at, 5, 10, 15, 235.

“ terminated by notice to quit, 13, 235.

Tenant at proceedings against certain proof required, 187.

Wharf—or pier, when within the act, 213.

Witnesses—Subpoenas for on forcible entries, 179.

Penalty for neglecting to attend, 179.

Oath to, on proceedings for forcible entry, 204, 209.

How compelled to attend and testify summary proceedings, 191.

Oath to, form of upon trial, summary proceedings, 274.

Attachment against, 359.

Order for, 358.

Writ—of error in certain proceedings, 315.

of restitution on forcible entries, form of, 206.

“ “ “ “ after verdict, 210.

of certiorari to review forcible entry proceedings, 314 to 317.

“ “ “ “ form of, 321.

of error, see “Court of Appeals.”

Writing—Certain leases to be in, 25, 26.

Wrongful acts—See titles Trespassers, Holding-over, Eviction, Damages.

Year—Definition of, 9.

Yearly tenancy, 15.

Years—Estates for, 5.

Tenancy for, 5, 16.

LAW PUBLICATIONS
OF
WARD & PELOUBET.

AUGUST, 1877

ABBOTT'S NATIONAL DIGEST OF UNITED STATES REPORTS AND STATUTES. A Complete and Accurate Epitome of the Jurisprudence and Legislation of the Government of the United States from the earliest period to the year 1875. By BENJ. VAUGHAN ABBOTT. 6 vols. 8vo. \$45.00

ABBOTT'S NATIONAL DIGEST OF UNITED STATES REPORTS AND STATUTES. Vol. 7; being the third supplement, and embracing all the statutes and decisions to September, 1877. Ready Sept. 15th, 1877.

ABBOTT'S TREATISE ON THE JURISDICTION AND PRACTICE IN THE UNITED STATES COURTS. This work gives a Full and Satisfactory Account of the Powers of the Various Federal Courts, and the Procedure usually employed in them. With all the Statutes of Practical Utility and Rules of Court, together with a Complete Collection of Forms. Third edition, entirely re-written and enlarged, embracing the law as declared in 1876. By BENJ. VAUGHAN ABBOTT. 2 vols. 8vo. \$15.00.

ABBOTT'S UNITED STATES CIRCUIT AND DISTRICT COURT REPORTS. Reports of Decisions rendered in the Circuit and District Courts of the United States. By BENJ. VAUGHAN ABBOTT. 2 vols. 8vo. \$15.00.

ABBOTT'S NEW YORK COURT OF APPEALS DECISIONS. This Official Collection comprises Full Reports of all such cases not contained in the series known as New York Reports as on careful examination have been found worthy of permanent preservation. Prepared under the sanction of the court, and recognized by the judges as authority. Edited by AUSTIN ABBOTT. With extensive notes and references. 4 vols. 8vo. \$24.00.

ABBOTT'S PRACTICE REPORTS, NEW SERIES. A Selection of Cases from the Various Courts of the State of New York which are likely to be of *permanent value and authority*. Edited by AUSTIN ABBOTT. 16 vols. \$80.00. These Reports will not lose their authority by the operation of the *New Code* as many of the decisions in the series, will be of value in interpreting and explaining its meaning. They also contain many cases not elsewhere reported.

- ABBOTT'S NEW CASES.** Selected Cases and Notes of Cases of general interest, and not elsewhere reported, on all subjects of Law and Equity. Edited by AUSTIN ABBOTT. Vol. 1. \$6.00. Vol. 2 now being issued in numbers.
- BAKER ON THE LAW OF MANUFACTURING CORPORATIONS OF NEW YORK STATE.** This work embraces the Laws of 1811 and 1848, with all the Amendments down to the present time, arranged under sections, and citing all the Cases bearing upon the question of the Rights, Duties, and Liabilities of Trustees and Stockholders, as between themselves, and as affecting the Rights of Creditors of Corporations. 8vo \$4.00.
- BANKRUPT LAW AS IT NOW IS.** Together with the Amendment of June 22, 1874. An Essay on the present Condition of the Bankrupt Law, with Notes and References. By A. BLUMENSTIEL. \$0.25.
- BENCH AND BAR OF NEW YORK.** Containing Biographical Sketches of Eminent Judges and Lawyers of the New York Bar, Incidents of the Important Trials in which they were engaged, and Anecdotes connected with their Professional, Political, and Judicial Career. By L. B. PROCTOR. 1 large vol. of 779 pp. Extra cloth, \$5.00; library sheep, \$5.50; half calf, \$6.50.
- CODDINGTON'S DIGEST OF TRADE-MARK CASES.** A complete digest of Trade-Marks, as embraced in the English and American Reports and Statutes. By C. E. CODDINGTON, 8vo. \$6.00.
- CODE OF CIVIL PROCEDURE, 1877.** Containing the original text with the amendments inserted in their proper places. The whole carefully compared with official copies on file. Together with the sections of the old Code of Procedure that will remain in force after September, 1877. Bound in flexible cloth. Small 8vo. \$4.00.
- DENGLER'S WARD MAPS WITH BLOCK INDEX.** A Key to all Maps on Record in the Register's Office, in 1,300 Libers of Conveyances, locating the Maps on the blocks affected thereby. By ADOLPH DENGLER. \$1.00.
- EDMOND'S REPORTS OF SELECT CASES.** Reports of Cases Decided in the Supreme Court of New York. By JOHN W. EDMONDS, formerly Justice of the Supreme Court. Judge Ingraham says: "The cases are of much interest, and contain historical information which cannot be obtained elsewhere." 8vo. \$7.50.
- FOX'S DIGEST TO THE LAW OF PARTNERSHIP.** A General Digest of the Law of Partnership, presenting the American and English Adjudications. By CHARLES FOX, late Judge of the Superior Court of Cincinnati. 1 vol. 8vo. \$6.50.

Judge Fox has cited no case which he has not personally examined, and the profession may rest assured they will not be disappointed when they compare the digested case with the case cited.

GUERNSEY'S KEY TO EQUITY JURISPRUDENCE. Designed for the use of law students. This work is for the express purpose of Aiding Law Students in the study, and to clearly understand this great branch of the law as a system, complete within itself, and as founded upon Logical and Scientific Principles. The arrangement is such that it can be used with any work on Equity Jurisprudence. By R. S. GUERNSEY. 8vo. \$4.00.

HILLIARD'S ELEMENTS OF AMERICAN LAW. A comprehensive treatise on American Law, designed for the practising lawyer, as well as for the student and general reader. By FRANCIS HILLIARD, author of "Torts," "Mortgages," &c. Vol. 1. \$7.50, ready in September 1877. Vol. 2 in press.

HOFFMAN ON REFEREES. The Powers and Duties of Referees, with Numerous Forms. By Hon. MURRAY HOFFMAN. 8vo. \$6.50.

INDEX TO THE MAPS ON RECORD IN THE REGISTER'S OFFICE IN NEW YORK CITY. Compiled by ADOLF DENGLER. Cloth. \$2.00.

JOHNSON'S REPORTS OF CHASE'S DECISIONS. This volume contains the Decisions of Chief Justice Chase in the United States Circuit Court for the Fourth Circuit, during the years 1865 to 1869 inclusive. It contains a Complete Record of the Case of Jefferson Davis, the only State Trial growing out of the Civil War, besides many other Important Cases. By BRADLEY T. JOHNSON, Esq., of the Virginia Bar. 1 vol. 8vo. \$7.50.

LANGBEIN'S DISTRICT COURT PRACTICE. Practice in the District Courts of the City of New York. With a Full Collection of Forms. By LANGBEIN BROTHERS. \$4.50.

LYNCH ON REAL ESTATE BROKERS. A Treatise on the Law of Real Estate Brokers, in which are discussed all questions relating to this important subject. By WM. R. LYNCH. 1 vol. \$1.50.

LYNCH'S NOTARY PUBLIC AND FORM BOOK. This work affords a Complete and Accurate Guide to the Duties of Notaries and Commissioners of Deeds. By WM. R. LYNCH. \$1.50.

MCADAM ON TERMS OF COURT. An essay on *Dies Juridici*, or Law Days. By Hon. DAVID MCADAM. Paper. \$0.50.

- MCADAM'S LANDLORD AND TENANT. A Practical Treatise on the Law of Landlord and Tenant. By Hon. DAVID MCADAM. 8vo. \$5.50.
- MCADAM'S MARINE COURT PRACTICE. Practice of the Marine Court of the City of New York, with the latest statutory enactments, and a Complete Collection of Forms. By Hon. DAVID MCADAM. 3d edition. \$4.50.
- NEW YORK SUPERIOR COURT REPORTS. Vols. 33 to 41. Jones and Spencer, vols. 1 to 9 inclusive. Reports of cases decided in the Superior Court of the City of New York. By SAMUEL JONES and JAMES C. SPENCER, Official Reporters. Per vol., \$7.00. Vol. 10 now being issued in serials.
- PENNINGTON'S NEW JERSEY REPORTS. 2 vols. \$15.00.
- REMARKABLE TRIALS. A Collection of Fifteen of the Most Remarkable Trials on Record, with notes, and speeches of counsel, &c. Compiled by DUNPHY & CUMMINGS. Cloth, \$3.50; sheep, \$4.50.
- RIDDLE ON SUPPLEMENTARY PROCEEDINGS. The Law and Practice of Supplementary Proceedings, with Forms. By D. S. RIDDLE. 8vo. \$7.50.
- ROYALL'S DIGEST OF GRATTAN'S VIRGINIA REPORTS. A Digest of Grattan's Va. Reports from 1844 to 1873. By WM. L. ROYALL, of the Virginia Bar. 8vo. \$8.00.
- STONE'S ANALYTICAL INDEX TO THE NEW YORK REPORTS. An Analytical Index of Parallel References to the cases cited in the "New York Reports." By CHAS. FRANCIS STONE. \$4.50.
- SUPPLEMENT TO RIDDLE'S SUPPLEMENTARY PROCEEDINGS. Tracing the law down to 1876. With many Notes and References. By JOHN F. BAKER. \$2.00.
- TAYLOR'S DEFENSE OF INSANITY. Opening Address of JOHN A. TAYLOR in the trial of John J. Burroughs. \$0.75.

WARD & PELOUBET,

LAW PUBLISHERS,

80 Nassau Street, New York.

